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## The Ninth Circuit's Decision in Oregon Natural Desert Association v. Dombeck: Discharging Responsibility for Water Pollution on Federal Lands

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THE NINTH CIRCUIT'S DECISION IN *OREGON NATURAL  
DESERT ASSOCIATION v. DOMBECK*: "DISCHARGING"  
RESPONSIBILITY FOR WATER POLLUTION ON  
FEDERAL LANDS

I. INTRODUCTION

Congress established the Federal Water Pollution Control Act (FWPCA),<sup>1</sup> commonly known as the Clean Water Act (CWA), to address the growing concerns over the deterioration in the quality of state waters.<sup>2</sup> A primary goal of CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>3</sup> The means used to achieve this objective is directly regulating identifiable sources of water pollution.<sup>4</sup> The regulatory scheme of CWA classifies sources of pollution into point sources<sup>5</sup> and

1. Federal Water Pollution Control Act (FWPCA), §§ 101-607, 33 U.S.C. §§ 1251-1387 (1987 & Supp. V 1994). The Act was first enacted on June 30, 1948 as the "Water Pollution Control Act." See C.W.A. § 101, 33 U.S.C. § 1251. The purpose of the original Act was to "prepare or adopt comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries thereof and improving the sanitary condition of surface and underground waters." *Id.*

2. See C.W.A. § 101(a), 33 U.S.C. § 1251(a).

3. *Id.* For further discussion of CWA's goals, see *infra* notes 24-26 and accompanying text.

4. See *id.* C.W.A. § 101(a)(1)-(7), 33 U.S.C. § 1251(a)(1)-(7); see also Lieutenant Commander Jeffrey W. Styron, *Regulation of Nonpoint Sources of Water Pollution on Public Lands*, 41 NAVAL L. REV. 97, 98 (1993) (addressing emergence of nonpoint source pollution as predominant remaining water pollution problem); Alia S. Miles, Comment, *Searching for the Definition of "Discharge": Section 401 of The Clean Water Act*, 28 ENVTL. L. 191, 196 (1998) (noting means to achieve CWA's primary goal is "by combining state water quality standards with the technology-based approach of setting effluent limitations on what a point source can discharge into the waters"). Water pollution control is addressed directly through various permit provisions of CWA. See *infra* note 26 and accompanying text. CWA further provides for control measures aimed at reducing known, but not as easily identifiable, water pollution through indirect regulation. See *infra* notes 10 & 34 and accompanying text. For a discussion of the identifiability of a source as a means of assigning regulation under CWA, see *infra* note 17; *infra* notes 71-73 and accompanying text. For a discussion of the differentiation in regulation for point and nonpoint sources of pollution, see *infra* notes 9-10 & 27-34 and accompanying text.

5. See *id.* C.W.A. § 502(14), 33 U.S.C. § 1362(14). For the statutory definition of point source, see *infra* note 54 and accompanying text. For an in-depth discussion of the case law interpreting the term "point source," see *infra* notes 64-85 and accompanying text.

nonpoint sources.<sup>6</sup> Identifiable sources of water pollution easily encompass point sources of pollution, thus, courts have broadly interpreted point sources of water pollution.<sup>7</sup> In contrast, nonpoint sources of pollution are not easily identifiable though they are a major cause of contamination in the nation's waters.<sup>8</sup> Although

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6. See *infra* note 53. The term nonpoint source is not defined by CWA. See Brian L. Frank, Comment, *Cows in Hot Water: Regulation of Livestock Grazing Through the Federal Clean Water Act*, 35 SANTA CLARA L. REV. 1269, 1287-88 (1995) (stating, "virtually any activity that produces pollution not channeled through a discrete conveyance may be a nonpoint source"); see also Miles, *supra* note 4, at 197 (defining nonpoint source as "any source of pollution that cannot be traced to a point source"). EPA, however, has provided the following characterization of nonpoint source pollution:

[U]nlike pollution from industrial and sewage treatment plants, [nonpoint source pollution (NPS)] comes from many diffuse sources. NPS pollution is caused by rainfall or snowmelt moving over and through the ground. As the runoff moves, it picks up and carries away natural and human-made pollutants, finally depositing them into lakes, rivers, wetlands, coastal waters, and even our underground sources of drinking water. These pollutants include:

- Excess fertilizers, herbicides, and insecticides from agricultural lands and residential areas;
- Oil, grease, and toxic chemicals from urban runoff and energy production;
- Sediment from improperly managed construction sites, crop and forest lands, and eroding streambanks;
- Salt from irrigation practices and acid drainage from abandoned mines;
- Bacteria and nutrients from livestock, pet wastes, and faulty septic systems;
- Atmospheric deposition and hydromodification are also sources of nonpoint source pollution.

Environmental Protection Agency, *What Is Nonpoint Source (NPS) Pollution? Questions and Answers* (visited May 10, 1999) <<http://www.epa.gov/OWOW/NPS/qa.html>>. See also *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 652 n.3 (2d Cir. 1993) (providing EPA's characterization of nonpoint source pollution in observing nonpoint sources of pollution "are many, difficult to identify and difficult to control"), *cert. denied by United States v. Villegas*, 512 U.S. 1245 (1994); *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1424 n.8 (9th Cir. 1989) (describing nonpoint source pollution).

For a discussion of courts' distinction between nonpoint and point sources of pollution, see *infra* notes 64-85 and accompanying text. For the Ninth Circuit's characterization of nonpoint sources, and nonpoint sources of pollution, see *infra* note 68-73 and accompanying text. For a discussion of nonpoint sources as characterized by Congress, see *infra* note 57.

7. For a list and discussion of courts broadly interpreting the term "point source," see *infra* notes 71-76 and accompanying text. For a court decision declining to expand the definition of point source, see *infra* notes 77-80 and accompanying text.

8. See Styron, *supra* note 4, at 97-98 (establishing nonpoint sources as predominant source of pollution stating, "As efforts to check pollution from identifiable point sources progress, the problems resulting from nonpoint sources are becoming much more apparent."); Dianne K. Conway, Note, *TMDL Litigation: So Now What?* 17 VA. ENVTL. L.J. 83, 87 n.22 (1997) (citing EPA study finding "78% of states claimed that the problem of nonpoint source pollution was greater or equal

to that of point source pollution"); see also Environmental Protection Agency, *What is Nonpoint Source (NPS) Pollution? Questions and Answers* (visited May 10, 1999) <<http://www.epa.gov/OWOW/NPS/qa.html>> ("States report that nonpoint source pollution is the leading cause of water quality problems.").

EPA has listed the main cause of nonpoint pollution as runoff resulting from agriculture, silviculture, mining, construction activities, and runoff from urban areas. See Conway, *supra*, at 87 (citing EPA, *Managing Nonpoint Source Pollution: Final Report to Congress on Section 319 of the Clean Water Act* (1989), 15-16 (1992)). EPA further indicates that agriculture is the leading cause of pollution in the nation's rivers and streams. See Environmental Protection Agency, Office of Water, *Water Quality Report: The Quality of Our Nation's Water: 1996* (visited May 10, 1999) <<http://www.epa.gov/305b>> (noting 70% of all water quality problems attributable to agriculture). In addition, "the most recent National Water Quality Inventory reports that agricultural nonpoint source (NPS) pollution is the leading source of water quality impacts to surveyed rivers and lakes, the third largest source of impairments to surveyed estuaries, and also a major contributor to ground water contamination and wetlands degradation." Environmental Protection Agency, *Managing Nonpoint Source Pollution from Agriculture, Pointer No. 6* (visited May 10, 1999) <<http://www.epa.gov/owowwtr1/NPS/facts/point6.htm>>. The report also recently said "that forestry activities contribute to approximately [nine] percent of water quality problems." Environmental Protection Agency, *Managing Nonpoint Source Pollution from Forestry, Pointer No. 8* (visited May 10, 1999) <<http://www.epa.gov/owowwtr1/NPS/facts/point8.htm>>. See also Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 *ECOLOGY L.Q.* 201, 203 (1996) (noting nonpoint source pollution has set back efforts to restore water quality). In addition to causing pollution to waters, activities such as grazing and logging also damage indigenous plants and surrounding soil. See ROBERT W. ADLER ET. AL, *THE CLEAN WATER ACT 20 YEARS LATER*, 180-83 (1993) (describing effects of grazing and logging on Federal lands); Frank, *supra* note 6, at 1269 (describing effects of grazing on federal lands). For example, grazing often results in soil erosion and sediment buildup causing warm polluted waters. See Styron, *supra* note 4, at 102. Upon undertaking a study of the grazing practices in the United States, it has been asserted that livestock grazing is the "single largest contributor to environmental degradation of public lands." Frank, *supra* note 6, at 1269. The vast majority of public land has been polluted by livestock grazing, and approximately seventy percent of the Western lands are comprised of ranching areas. See *id.* at 1273 n.35. Not only do they destroy the immediate area they inhabit, but also entire ecosystems. See *id.* at 1276. Cattle tend to congregate in one area, systematically destroying the foliage and riparian life, as well as polluting waters by defecating, which carries downstream to other waters. See *id.* at 1273 n.35.

One dramatic example of the effect of nonpoint pollution from mining and agriculture, is the deterioration of the rivers around the Black Hills. See *Water Pollution: Tribe, Environmental Groups Sue EPA for Failure to Set TMDLS in South Dakota*, 128 *Daily Env't Rep.* (BNA) A-4 (Monday, July 6, 1998). Children playing in the rivers develop skin rashes; fish either no longer inhabit the water or exhibit open sores; and some lakes within the district cannot be used for swimming, fishing or farming. See *id.*

The effects of nonpoint pollutants may not always be so easily identifiable in every water body. See Environmental Protection Agency, *What Is Nonpoint Source (NPS) Pollution? Questions and Answers* (visited May 10, 1999) <<http://www.epa.gov/OWOW/NPS/qa.html>>. The pollutants do, however, "have harmful effects on drinking water supplies, recreation, fisheries, and wildlife." *Id.*

For a discussion of the impact and regulation of agricultural nonpoint source pollution under CWA, see generally George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 *U.C. DAVIS L. REV.* 461 (1990); David Zaring, Note, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 *HARV. ENVTL. L. REV.* 515 (1996). For a discussion of

CWA is generally held to be effective in reducing point sources of pollution,<sup>9</sup> it is unclear how effectively the Act regulates nonpoint sources of pollution.<sup>10</sup>

mining activity regulation under CWA, see generally Alison Barry, *Mining and Water Quality Under the Clean Water Act*, COLO. LAW., Sept., 1996, at 93.

9. See, e.g., Donahue, *supra* note 8, at 203 (listing examples of point sources effectively regulated).

10. Compare ADLER, *supra* note 8, at 171 (explaining reasons for section 319 failure in reducing nonpoint source pollution) and WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 298 (2d ed. 1994) (noting section 319 only minimally reduced pollution) and Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons From the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 287-89 (1999) (advocating for integrated approach to reduce nonpoint source pollution) and Kevin Beaton, *Overview of Idaho Water Quality Standards, The 1998 Idaho Water Quality Symposium*, 35 IDAHO L. REV. 453, 454-55 (explaining CWA's flaw results from lack of mandatory controls for nonpoint source activities) and Donahue, *supra* note 8, at 203 (asserting nonpoint source pollution has "scarcely" been addressed) and Arthur D. Smith, *Introduction to the 1998 Idaho Water Quality Symposium, The 1998 Idaho Water Quality Symposium*, 35 IDAHO L. REV. 431, 435 (1999) (identifying states' failure in controlling nonpoint source pollution as impetus for Ninth Circuit TMDL litigation) and Styron, *supra* note 4, at 108 (positing CWA does not regulate nonpoint sources due to states unwillingness to voluntarily limit such pollution) and Miles, *supra* note 4, at 199 (noting current debate regarding nonpoint source regulation due to ineffectiveness of CWA in regulating nonpoint source pollution) with Environmental Protection Agency, *Managing Nonpoint Source Pollution from Agriculture, Pointer No. 6* (visited May 10, 1999) <<http://www.epa.gov/owow/wtr1/NPS/facts/point6.htm>> (noting nonpoint source regulation has been effective in reducing runoff).

Water pollution is recognized as remaining a significant problem "in large part from inadequate programs to address cumulative harms to aquatic ecosystems from disparate and diffuse pollution sources." Adler, *supra*, at 203. A 1991 EPA report based on twenty state reports on the impact of nonpoint source water pollution submitted to Congress "estimated that more than half of river miles impacted by nonpoint source pollution could not support designated uses because of the impact, and use was only partially supported in 28% of the river miles." Conway, *supra* note 8, at n.24 (citing Environmental Protection Agency, EPA-506/9-90, *Managing Nonpoint Source Pollution: Final Report to Congress on Section 319 of the Clean Water Act* (1989) 15-16 (1992) (1989 NPS Report)).

In general, water pollution controls are categorized into technology based limitations aimed at regulating individual polluters, and water quality standards, set by the states, to control cumulative effects from many sources of pollution, i.e. nonpoint source pollution. See Adler, *supra*, at 206-07 (contrasting types of pollution control under CWA); cf. Miles, *supra* note 4, at 198 (reviewing 1972 Amendments to CWA). Water quality standards are comprised of three elements: beneficial uses, water quality criteria, and antidegradation policies implemented through total maximum daily loads of pollution allowable for each waterbody and a continued planning process which encourages "areawide waste treatment management" plans. See generally, Adler, *supra*, at 209-230 (describing development and implementation of water quality standards). The continuing planning process for each waterbody must include controls for both point sources of pollution, through CWA section 301, and nonpoint sources of pollution, through CWA section 208 and, most recently, CWA section 319. See Adler, *supra*, at 219 (distinguishing between point and nonpoint source water quality standards); Miles, *supra* note 4, at 199-200 (discussing regulation of nonpoint sources). This overall pollution control scheme focuses on controlling identifiable sources of pollution from individual polluters and leaves the regulation of nonpoint sources of pollution to the states. See Adler, *supra*, at 207, 288 (explaining flaws in CWA's regulation scheme

and noting CWA nonpoint source pollution policy focuses on allowing individual states to develop programs suited to their needs); Clare F. Saperstein, Note, *State Solution to Nonpoint Source Pollution: Implementation and Enforcement of the 1990 Coastal Zone Amendments Reauthorization Act Section 6217*, 73 B.U. L. REV. 889, 890 (1995) (characterizing nonpoint source pollution). Thus, each state is responsible for setting its own water quality standards with which nonpoint sources of pollution, such as grazing, silvicultural and agricultural activities, must comply. See Adler, *supra*, at 213 (discussing water quality standard promulgation) (citing CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2)); Saperstein, *supra*, at 896 (describing nonpoint source management under CWA section 208). Under CWA section 208, which directly addresses nonpoint sources, the method to control nonpoint sources of pollution are Best Management Practices. See Styron, *supra*, note 4, at 106 (describing section 208); Miles, *supra* note 4, at 199-200 (offering reason for failure of section 208 program). Contrary to point source regulation, a state is not required under CWA section 208 to create or implement a continuing planning process, and further, EPA is precluded from doing so in its place. See Adler, *supra*, at 226-27 (comparing CWA provisions addressing point source and nonpoint sources). Section 319 was added in 1987 and was intended as a more sure means by which states could reduce nonpoint source pollution. See Adler, *supra*, at 228 (critiquing CWA section 319's effectiveness); Miles, *supra* note 4, at 200 ("Section 319 basically makes states more accountable to EPA for the success of their section 208 plans by requiring states to report to EPA their success in meeting implementation schedules and by threatening funding cutoffs if the states fail to make satisfactory progress."); Saperstein, *supra*, at 896-98 (reviewing CWA nonpoint source controls). Under this provision, states identify nonpoint source water pollution problems and then develop management programs tailored to these specific water quality problems. See Environmental Protection Agency, Section 319 Federal Consistency Guidance, 63 Fed. Reg. 45504 (1998). With the addition of this provision, a new focus of nonpoint source control was a watershed approach, addressing specific, as opposed to diverse water quality problems. See Adler, *supra*, at 228 (asserting, however, "section 319 did little to remedy the lack of precise requirement for states to match specific management practices with the degree of control necessary . . . to meet [water quality standards]").

Leaving regulation of nonpoint pollution to the states, however, particularly the western states, has allowed those sources responsible for the majority of pollution on federal lands to go unabated. See 1977 U.S. Code Cong. & Admin. News at 4336 (recognizing possible reluctance of states to develop effective control measures); H. Michael Anderson, *Water Quality Planning for the National Forests*, 17 ENVTL. L. 591, 608 (1987) (asserting, CWA, by leaving states to define how to regulate nonpoint sources, exempts nonpoint sources of pollution from water quality standards in some western states); Styron, *supra* note 4, at 98, 111-12 (noting many western states, where the majority of public lands lie, exempt logging and grazing from regulation, further stating, "Clearly, the activities currently taking place on public lands must be addressed if states are going to be able to reach the goals established by [CWA]" ); Robert D. Fentress, Comment, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 ENVTL. L. 807, 825 (1989) (noting Congress failed to give EPA power to require state plans even though abatement of nonpoint source pollution is national goal); Saperstein, *supra* note 10, at 898-99 (observing voluntariness of CWA nonpoint source programs reduces pollution control effectiveness); *Air and Water Pollution: Western States Redefining Problem Away?* AMERICAN POLITICAL NETWORK GREENWIRE, June 18, 1998 (reporting on some western states' failure to list, or removal from list of, polluted waterbodies which should be subject to CWA regulation). A large portion of the west is federal land, including one half of Oregon. See Tom Alkire, *Nonpoint Sources: CWA Decision Moots Oregon Grazing Rules, Could Affect TMDLS in Many Western States*, 29 Env't Rep. (BNA) 738 (Aug. 7, 1998). Of these federal lands, only fifty percent are maintaining water quality standards, in large part because of graz-

ing. See Bob Egelko, *Court Says States Lack Authority on Federal Land*, PORTLAND OREGONIAN, Thursday, July 23, 1998, at A-14. As noted, state implementation and enforcement of nonpoint source pollution plans are voluntary, and due to possible land use and development limitations, "nonpoint source controls are more politically charged and difficult to plan, implement, and administer." Conway, *supra* note 8, at 88; see also Styron, *supra* note 4, at 107 (explaining states refusal to implement section 208 is reason for abundance of nonpoint source pollution and recognizing lack of enforcement as major criticism of section 208). There are no uniform guidelines for setting and monitoring water quality standards, thus, states base their varying control measure on politics and economics. See Adler, *supra*, at 253-54 (describing inconsistency in regulation of nonpoint source pollution among states); Styron, *supra* note 4, at 111-12 (pointing out differentiation between states in applying nonpoint source control laws). Further, section 319's approach, though moving toward addressing specific nonpoint source problems, may not be able to adequately address the cumulative effects of many different nonpoint sources of pollution. See Adler, *supra*, at 285 (suggesting cumulative impacts may cause violation of water quality standards). Some commentators have posited that western states are reluctant to increase regulation under CWA due to the lobby of powerful interest groups (among them cattle ranchers). See Donahue, *supra* note 8, at 285 (stating Congress likely avoided regulating nonpoint sources due to political power groups such as livestock ranchers); Styron, *supra* note 4, at 112 (suggesting reluctance of states to regulate nonpoint sources is due to fear about economic results to "most nonpoint source polluters-especially forestry and livestock grazing"); Fentress, *supra*, at 822 (noting nonpoint source management is not taken seriously because states hesitate to tell "powerful constituents" how to regulate their operations); Frank, *supra* note 6, at 1277-78 (reviewing history of federal land management); Zaring, *supra* note 8, at 540-41 (regulating nonpoint sources would be difficult even were source identifiable due to pressure of political groups who elect legislators). For example, over the years ranchers began to monopolize federal lands "[u]sing whatever means were necessary," and promulgated their own "'cow custom'" of unwritten laws regarding the use of resources on federal lands. See Frank, *supra* note 6, at 1277, 1277 n.68. Today, "'cow custom'" defines the control of the livestock grazing industry. See *id.* at 1277 n.68 (citation omitted). New regulations would be expensive for ranchers to comply with, and would increase taxes within the state. See Zaring, *supra* note 8, at 537-39 (discussing agriculture bill tailored to special interest groups); see also Styron, *supra* note 4, at 112 (noting those responsible for nonpoint source pollution are not willing to limit nonpoint sources, fearing negative economic consequences). They failed to consider, however, that the lack of effective control measures for nonpoint sources of pollution may require point source polluters to meet state water quality standards alone. See Adler, *supra*, at 228-29 (noting CWA may be read to exclude nonpoint source controls from water quality standards). Even for those states with a commitment to addressing nonpoint source pollution, CWA is limited in information on how to implement nonpoint source programs. See Saperstein, *supra* note 10, at 897-98 (explaining CWA lacks guidelines for establishment, and enforcement, of nonpoint source programs).

EPA has recently promulgated regulations regarding the management of nonpoint source pollution that addresses the lack of guidance and resulting lack of consistency between states and federal agencies in controlling nonpoint source pollution. See Environmental Protection Agency, Section 319 Federal Consistency Guidance, 63 Fed. Reg. 45504 (1998). EPA clearly states in this regulation,

The federal consistency provisions in Section 319 of [CWA] authorize each state to review federal activities for consistency with the state nonpoint source management program. If the state determines that an application or project is not consistent with the goals and objective of its nonpoint source management program and makes its concerns known to the responsible federal agency, the federal agency *must* make efforts to

accommodate the state's concerns or explain its decision not to. The purpose of the guidance is to support closer coordination among State and Federal agencies, improve implementation of nonpoint source management programs, and more effectively protect water quality.

*Id.* Further, EPA is currently developing guidelines for the use of state antidegradation policies in addressing nonpoint source pollution. See Susan Brunninga, *Water Pollution: Guidance to Address Nonpoint Sources by Antidegradation Plans Being Drafted*, 169 Daily Env't Rep. (BNA) A-10 (Tuesday, Sept. 1, 1998) (reporting agency official's statement). Barring an EPA regulation addressing nonpoint source management issues, states may well be able to look to their own laws in order to control nonpoint sources of water pollution within their borders. See generally Environmental Law Institute, *ALMANAC OF ENFORCEABLE STATE LAWS TO CONTROL NONPOINT SOURCE WATER POLLUTION*, 1997. Recognizing that current control methods are inadequate for preventing, controlling and abating nonpoint source pollution, particularly due to the lack of enforcement mechanisms provided under CWA, the Environmental Law Institute reviewed state laws and programs and produced "a state-by-state summary of enforcement-based laws that are potentially applicable to nonpoint source water pollution." *Id.* at 1 (defining enforceability "as the ability of the state to impose a sanction upon an unwilling person or entity"). Some commentators, however, have proposed that the surest way to assure control of nonpoint source pollution is for Congress to amend CWA to mandate regulation of nonpoint sources of pollution. See ADLER, *supra* note 8, at 241-42 (proposing Congress amend CWA to require management of nonpoint sources); Adler, *supra*, at 208, 270-73 (analogizing CWA to Clean Air Act in assertion nonpoint source pollution control should focus on identifying specific pollution sources and control measures states should be required to adopt, and concluding CWA should be amended to require technology based limitations be applied to nonpoint sources of pollution); Styron, *supra* note 4, at 113-14 (proposing federal regulation of water itself); Frank, *supra* note 6, at 1305-07 (proposing policy revision mandating regulation of livestock under CWA); Miles, *supra* note 4, at 193 ("There can be little doubt that requiring federally permitted activities to meet state water quality standards would do wonders for water quality, the ecological integrity of riparian zones and freshwater ecosystems, and the fish and wildlife species which depend upon those systems."). Such an amendment to CWA could be the impetus for states to give practical effect to programs aimed at protecting water, such as developing and implementing total daily maximum loads for each waterbody. See Adler, *supra*, at 283 (advocating for complete prohibition of discharges into polluted waters); Frank, *supra* note 6, at 1306 (proposing new regulations containing enforcement provisions). For example, a state could condition a permit for grazing on a rancher's construction of fencing to keep cattle from wading in streams. See Paul Larmer, *Judge Sends a Message to Cows*, HIGH COUNTRY NEWS, Oct. 28, 1996. The new watershed approach of CWA section 319 offers another solution to nonpoint source pollution. See Adler, *supra*, at 208 ("In the current political environment, however, Congress is unlikely to subject nonpoint source water pollution to enforceable federal controls."); Styron, *supra* note 4 at 114 (exhorting federal agencies to use applicable provisions to limit nonpoint source pollution because Congress is not likely to address such pollution through legislation or Amendment). Regulation of individual sources of nonpoint pollution, however, may not effectively divert or reduce the damage that has already been done to the nation's waters on federal lands. See Adler, *supra*, at 204 (suggesting comprehensive, watershed-based approach to augment current controls). Another alternative, and the subject of this Note, proposes including nonpoint source pollution under CWA section 401. See *infra* note 17.

For an overview of how CWA regulates nonpoint source pollution, see generally ADLER, *supra* note 8; Styron, *supra* note 4; Conway, *supra* note 8; Frank, *supra* note 6; Miles, *supra* note 4. For an in-depth critical discussion of the effectiveness



One area of recent controversy is the scope of an individual state's power to regulate nonpoint source pollution occurring in waters located on federal land.<sup>11</sup> Section 401 of CWA requires an

of current nonpoint source regulation, and proposed solution for reducing nonpoint source pollution more effectively, see generally Adler, *supra*.

11. Compare generally Oregon Natural Desert Ass'n v. Thomas, 940 F. Supp. 1534 (D. Or. 1996) (construing section 401 as regulating nonpoint sources), *rev'd sub nom.* Oregon Natural Desert Ass'n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998) with Idaho Conservation League v. Caswell, No. CV 95-394-S-MHW, 1996 WL 938215, at \*1 (D. Idaho Aug. 12, 1996) (holding section 401 does not regulate nonpoint source pollution). For a discussion of the Ninth Circuit split regarding the scope of section 401 in regulation of water pollution, see *infra* notes 43-47 and accompanying text. For the facts, rationale, and holding of the Ninth Circuit's resolution of this split, see *infra* notes 86-98 & 107-43 and accompanying text.

Studies have shown that poor land regulation on federal lands has caused approximately 65% of the pollution in the waters of the western states. See Donahue, *supra* note 8, at 205 (noting all rivers in West run through federal land); see generally Robert L. Glicksman, *Pollution on the Federal Lands II: Water Pollution Law*, 12 UCLA J. ENVTL. L. & POL'Y 61 (1993) (discussing polluting factors on federal lands); Frank, *supra* note 6 (discussing grazing effects on federal land); Miles, *supra* note 4 (analyzing effect of nonpoint pollution on federal lands). Livestock grazing, timber cutting, road building and construction, and mining are activities conducted regularly on federal lands and have a significant negative impact on water quality. See Styron, *supra* note 4, at 98 (giving examples of nonpoint sources on federal lands, "includ[ing] timber harvesting, forest road construction, mining, livestock grazing, and reforestation efforts"); Miles, *supra* note 4, at 201 ("The causes and effects of nonpoint source pollution are especially prevalent on public lands, where many activities that cause nonpoint source pollution are daily occurrences, such as livestock grazing, timber cuts and roads, and resource extraction."). Waters become unfit for recreational use, and the ecosystem within the water becomes damaged, affecting connected waterbodies. See Styron, *supra* note 4, at 102; Miles, *supra* note 4, at 202 (discussing effects of overgrazing). For example, livestock grazing, the most common use of federal lands, causes riparian damage, introduces manure and sediment into the water, and "can impair the habitat of trout and other salmonids." Miles, *supra* note 4, at 280; see also Styron, *supra* note 4, at 102 (discussing effects of overgrazing on riparian ecosystems); Frank, *supra* note 6, at 1269 (discussing effects of overgrazing on public range land); Miles, *supra* note 4, at 202-03 (discussing effects of livestock grazing on water quality). It has been noted that livestock grazing is the most pernicious cause of damage to federal lands. See, e.g., Frank, *supra* note 6, at 1269 (describing ultimate effect of livestock grazing as destruction of riparian areas "integral to the sustained prosperity of the rangeland ecosystem").

Pursuant to CWA section 401, all activities on federal land must comply with state water quality standards, but only if point sources result in, or may result in, a discharge. For a discussion of water regulation on federal land, see *infra* notes 27-34 and accompanying text. States, however, have traditionally not been permitted to impose, or enforce, compliance with their water quality standards when pollution emanates from nonpoint sources of pollution, thus, states have no authority to control an immense amount of pollution damaging public lands located within their boundaries, and that potentially, and in reality, affects surrounding waters and lands located outside federal lands. See *infra* note 17.

For a further discussion of the effects of nonpoint source pollution, and means to regulate nonpoint source pollution, on federal land, see generally Donahue, *supra* note 8 (analyzing potential power of section 401); Glicksman, *supra*, (discussing pollution on federal lands); Styron, *supra* note 4, (addressing require-

applicant for a federal license to obtain state certification prior to issuance of the federal permit for any activity on federal land which may result in a discharge.<sup>12</sup> Thus, in order for a federal permit applicant to be subject to section 401 review,<sup>13</sup> a potential discharge must exist from conducting the proposed activity.<sup>14</sup> The term "discharge" in section 401, which includes point source pollution, does not explicitly include nonpoint source pollution.<sup>15</sup> Nonpoint source pollution has therefore not been regulated under section 401.<sup>16</sup>

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ments of federal agencies overseeing silviculture and stock grazing activities on public lands); Frank, *supra* note 6 (discussing effects of grazing on federal lands); Miles, *supra* note 4 (reviewing specific effects of grazing, timber harvesting and mining on water quality).

12. See C.W.A. § 401(a)(1), 33 U.S.C. § 401(a)(1). For the statutory language of section 401(a)(1), see *infra* notes 28 & 38.

13. For a description of the purpose and operation of section 401 review, see *infra* notes 17 & 28-30 and accompanying text. For an in-depth discussion of the Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, delineating states' power under section 401 review, see *infra* notes 35-42 and accompanying text.

14. See *infra* notes 31-34 and accompanying text. See also Donahue, *supra* note 8, at 218 (delineating two threshold conditions which must exist in order to trigger section 401 review).

15. See C.W.A. § 502(16), 33 U.S.C. § 1362(16). CWA states "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." *Id.* (emphasis added). The term "discharge of a pollutant" means "any addition of any pollutant . . . from a point source." C.W.A. § 502(6), 33 U.S.C. § 1362(6) (emphasis added).

For a general discussion of possible interpretations of the term "discharge," see *infra* notes 43-47 and accompanying text. For a discussion of the Ninth Circuit district court split regarding the interpretation of the term "discharge," see *infra* notes 43-47 and accompanying text.

16. See ADLER, *supra* note 8, at 245-46 (explaining section 401 has been limited in coverage to point source pollution); RODGERS, *supra* note 10, at 294 (interpreting CWA as regulating only point sources of pollution); *cf. also* Conway, *supra* note 8, at 86 (concluding based on Act's regulatory scheme, "Thus, the NPDES system focuses on the treatment of point source pollutants prior to their entrance into streams and other waterbodies, rather than on the water quality of those streams and waterbodies." (emphasis added)). But see Donahue, *supra* note 8, at 229 (arguing that "either a point source or a nonpoint source discharge can serve as the trigger for section 401 certification"). Traditionally, nonpoint sources of pollution have been regulated under CWA section 401 by court's expansion of the term "point source." See ADLER, *supra* note 8, at 245-46; RODGERS, *supra* note 10, at 294. The language of section 401, however, which applies to "any activity . . . which may result in any discharge," does not "[o]n its face" limit section 401 review to point source discharges. See Donahue *supra* note 8, at 229 (referencing CWA section 401(a) in discussing pollution sources the term "discharge" includes for 401 certification purposes). For a discussion of nonpoint sources falling within the definition of point source, see *infra* notes 70-76 and accompanying text. For arguments in favor of, and against, interpreting the term "discharge" as including both point and nonpoint pollution sources, see *infra* note 45.

Nevertheless, section 401 offers an effective means of reducing pollution from nonpoint sources.<sup>17</sup>

17. See ADLER, *supra* note 8, at 245-46 (proposing "Congress broaden and strengthen section 401 [by] . . . expressly [stating] that it applies [ ] to polluted runoff as well as to discharges from point sources"); Donahue, *supra* note 8, at 203-04 (highlighting potential application of section 401 to nonpoint source pollution); Saperstein, *supra* note 10, at 890-91 (asserting delegation of authority to states under NPDES program would be more effective means of regulation for nonpoint pollution sources); see also Donahue, *supra* note 8, at 206-07 (asserting federal permits other than those encompassing point sources should be subject to section 401 review). But see Frank, *supra* note 6, at 1305-06 ("New amendments to the Clean Water Act should place responsibility and accountability for creation and implementation of new nonpoint regulatory programs with the states."). As opposed to regulation under 319, which is voluntary, regulation under section 401 would require EPA, or the source state, to create and implement programs aimed at reducing and controlling identifiable pollution regardless of its source status. See Miles, *supra* note 4, at 209-12 (explaining PUD holding). Though nonpoint sources are viewed as difficult to identify, and thus hard to regulate, both from a practical and economic standpoint, in actuality, many nonpoint sources of pollution are amenable to remedial measures which will make them identifiable. See Frank, *supra* note 6, at 1301 (noting water monitoring of areas where cattle gather regularly may yield needed data to establish permit system); see also Donahue, *supra* note 8, at 207 (noting livestock grazing amenable to section 401 review). For example, groups of cattle that graze near the same water hole, causing excessive amounts of pollution to accumulate in the water, are identifiable as a source of pollution. See Frank, *supra* note 6, at 1301. Resulting pollutants from the grazing of the cattle can be measured and a permit system established to regulate the amounts of pollution. See *id.* Courts addressing what falls within section 401 have found that being able to identify the source of pollution, and measure its effects, justifies holding some nonpoint sources of pollution subject to section 401 review. See *infra* notes 71-73 and accompanying text.

EPA's Pollution Prevention Strategy clearly recognizes, and asserts, that preventing pollution at its source, as opposed to the end of the pipe prevention strategies, can resolve problems from nonpoint pollution. See Environmental Protection Agency, *Pollution Prevention Strategy*, 56 Fed. Reg. 7849, 7849 (1991) (being accomplished by changing production or reducing environmentally harmful materials). In addition, EPA stated that "preventing pollution at its source . . . can [not only] be the most effective way to reduce risks . . . [but] is often the most cost-effective option . . . [and] offers the unique advantage of harmonizing environmental protection with economic efficiency." *Id.* One commentator elaborated on the importance and potential power of section 401 as a tool for state regulation of nonpoint source pollution stating:

[D]espite its limitations, the Act in its present form both accords states greater authority for controlling pollution than they are currently exercising (and concomitantly, constrains federal discretion), and holds out a potent, but infrequently wielded, weapon against the most underregulated category of pollution, nonpoint sources. All of this power may be found in one section, section 401, the certification provision of the Clean Water Act.

Donahue, *supra* note 8, at 203-04 (internal citations omitted). For a list of judicial decisions focusing on the identifiability of the pollution source as the means to determine CWA regulation, as opposed to focusing on the pollution type, see *infra* note 70.

One noted environmentalist proposed an alternate means of including nonpoint source pollution under the scope of section 401. See RODGERS, *supra* note 10, at 298 (finding requirement of state plans more effective than guidelines

required under section 319). Given the court's trend to interpret point sources broadly, he stated that "the drawing of the law more tightly around nonpoint sources may transform them into 'point' sources for enforcement purposes" and making "nonpoint sources" into "point sources" for purposes of regulation. *Id.*; see also Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 HARV. ENVTL. L. REV. 569, 579-83 (1988) (advocating either including nonpoint source pollution under NPDES program, or allowing broadest point source interpretation possible, to further CWA's goals). For a list of court decisions expanding the definition of point source to include nonpoint source pollution, see *infra* notes 70-76. For case law within the Ninth Circuit addressing means to regulate nonpoint sources, and nonpoint source pollution, see *infra* notes 68-73.

The most effective means of ensuring state certification for nonpoint sources would be to simply amend CWA to regulate nonpoint source pollution directly. See Jake Thompson, *Water, Land Issues Concern Cattlemen*, OMAHA WORLD-HERALD, Saturday, February 7, 1998, at 6 (discussing then Vice President Al Gore's proposal CWA be revised to regulate nonpoint source pollution). This proposal, however, is not popular with ranchers who use federal lands in part because of the threat of a shift in the power allocation for property and water rights. See *id.* (explaining cattlemen prefer existing nonpoint source controls). In 1997, Vice President Al Gore announced that he favored CWA revisions which would regulate runoff from land that flows into drinking supplies. See *id.* Concern over drinking water could firmly solidify what appears to be an already existing potential function of section 401. See *Pollution Prevention: How Does the Law Protect Source Water?* 29 Env't Rep. (BNA) 942 (Sept. 4, 1998) (noting EPA's shift to preventing pollution as opposed to "cleaning up" and recognizing CWA's power as alternate tool in fight for safe drinking water when reauthorized). Paul Schwartz, national campaigns director, specifically named "animal wastes" as a significant threat to the nation's drinking waters. See *id.* Federal regulation is the best approach to accommodating partisan parties. See *id.* (recognizing power struggle between agricultural industry and water suppliers). Section 401 does not explicitly exclude nonpoint sources of pollution. See Larmer, *supra* note 10. States are not obligated to review federal permit activities. See *id.* 401 review is, nonetheless, a powerful tool states can use to protect their waters. See Egelko, *supra* note 10. For example, states could "deny a permit or require modifications such as fencing along streams." See Larmer, *supra* note 10.

From a policy standpoint, applying 401 review to nonpoint sources of pollution, particularly grazing, would help alleviate poor land management practices and allow states to meet their own water quality standards, as well as federal agencies obligations to regulate activities on federal land. See Donahue, *supra* note 8, at 249-50, 289 (discussing federal agencies responsibilities in regulating federal land and noting, "Assigning the states such a powerful role in approving federal activities that may affect water quality is also consistent with Congress's policy to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.'" (quoting C.W.A. § 101(b), 33 U.S.C. § 1251(b))). States could thus dictate the areas where cattle may graze or specify the numbers of livestock permissible. See *id.* at 291-922 n. 481, 300 (stating, "Unless and until Congress decides to amend [CWA] . . . it must be concluded that livestock grazing on public lands is subject to 401 review").

For a comprehensive analysis of section 401 which illuminates how CWA's language, purpose, legislative history, and relevant case law and policy considerations support regulation of nonpoint sources by section 401, see generally Donahue, *supra* note 8.

In *Oregon Natural Desert Association v. Dombeck* (*ONDA II*),<sup>18</sup> the topic of this Note, the United States Court of Appeals for the Ninth Circuit recently concluded that nonpoint sources of pollution do not fall within the statutory definition of discharge under section 401.<sup>19</sup> Part II of this Note discusses the statutory provisions, legislative history and case law pertinent to interpreting the term “discharge” under section 401 of CWA.<sup>20</sup> Part III sets forth the facts and procedural history of the Ninth Circuit’s decision in *ONDA II*.<sup>21</sup> Part IV explains the Ninth Circuit’s reasoning and provides a critical analysis of the *ONDA II* decision.<sup>22</sup> Finally, Part V discusses the environmental, legal and political impact of the *ONDA II* decision.<sup>23</sup>

## II. BACKGROUND

### A. CWA and Federal Land

Congress contemplated a water pollution prevention program that was comprehensive in nature<sup>24</sup> and aimed not only to reduce

18. 151 F.3d 945 (9th Cir. 1998), *rev’g* Oregon Natural Desert Ass’n v. Thomas, 940 F. Supp. 1534 (D. Or. 1996). (“Editor’s Note: The opinion of the United States Court of Appeals, Ninth Circuit, in Oregon Natural Desert Association v. Dombeck, published in the advance sheet at this citation, 151 F.3d 945, was withdrawn from the bound volume at the request of the Court.”).

19. For a discussion of the *ONDA II* court’s holding and analysis, see *infra* notes 107-43 and accompanying text.

20. For a discussion of the varying interpretations and analysis of the term “discharge,” see *infra* notes 31-34 (discussing both a “broad” and “narrow” interpretation of the term “discharge”) & 43-47 (presenting Ninth Circuit split regarding the correct interpretation of the term “discharge” in section 401) & 59-63 (judicial interpretation of the term “discharge”) and accompanying text.

21. For a discussion of the facts and procedural history of *ONDA II*, see *infra* notes 86-98 and accompanying text.

22. For a discussion of the district court’s opinion in *Oregon Natural Desert Association v. Thomas*, reversed by the Ninth Circuit in *ONDA II*, see *infra* notes 99-106 and accompanying text. For a discussion of the Ninth Circuit’s analysis in *ONDA II*, see *infra* notes 107-43 and accompanying text. For a critical analysis of the *ONDA II* decision, see *infra* notes 144-93 and accompanying text.

23. For a discussion of the environmental, legal and political impact of the *ONDA II* decision, see *infra* notes 194-207 and accompanying text.

24. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 (1981) (reaffirming Court’s decision in *Train v. City of New York* (quoting language of *Train*, 420 U.S. 35, 37 (1975))); *Train v. City of New York*, 420 U.S. 35, 37 (1975) (“The [CWA] Amendments of 1972 provide a comprehensive program for controlling and abating water pollution.”); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 372 (10th Cir. 1979) (assessing usefulness of CWA’s legislative history). CWA’s purpose is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s water.” C.W.A. § 101(a), 33 U.S.C. § 1251(a). Congress specifically mandated that in order to meet this goal, both category sources of pollution, point and nonpoint, must be addressed in any program under CWA. See C.W.A. § 101(a)(7), 33 U.S.C. § 1251(a)(7). Thus, CWA promulgates a program targeting the control and reduction of pollution impairing uses of designated waters. See generally C.W.A. § 303, 33 U.S.C. § 1313.

water pollution, but to eliminate the discharge of pollutants into the nation's waters.<sup>25</sup> In furtherance of this goal, the Act prohibits the discharging of a pollutant into the nation's navigable waters from a point source unless specifically approved under a permit provision.<sup>26</sup>

25. See C.W.A. § 101(a)(1), 33 U.S.C. § 1251(a)(1); see also *Earth Sciences*, 599 F.2d at 373 (construing congressional intent in enacting CWA as elimination of pollution by 1985 from nation's waters, thus, as complete regulation of all water pollution sources); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1242 (10th Cir. 1979) (noting preserving water quality was intent of Congress). In order to achieve this goal, Congress mandated that toxic amounts of pollution be prohibited, "areawide waste treatment management planning processes technology be developed and implemented to assure adequate control of sources of pollutants in each State; and . . . that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters . . . ." C.W.A. §§ 101(a)(3), (5), & (6), 33 U.S.C. §§ 1251(a)(3), (5), & (6). Congress further stated that "an interim goal of water quality [is to] provide[] for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water . . . ." C.W.A. § 101(a)(2), 33 U.S.C. § 1251(a)(2). In 1987, Congress specifically mandated that control of nonpoint source pollution be a national policy of CWA, stating, "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." C.W.A. § 101(a)(7), 33 U.S.C. § 1251(a)(7).

For a brief overview of CWA, see generally *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976); Miles, *supra* note 4, at 196-201.

26. See C.W.A. § 301(a), 33 U.S.C. § 1311(a) (proscribing discharges unless compliance with provisions stipulated under permit for Dredge and Fill Material or National Pollutant Discharge Elimination System (NPDES)); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 112 (1977) (interpreting section 301 as prohibition of pollutant discharges); *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990) (construing congressional intent to be one of complete prohibition of discharges of pollutants without permit (quoting in part C.W.A. § 301(a), 33 U.S.C. § 1311(a))). The relevant language states, "(a) Illegality of pollutant discharges except in compliance with law [-] Except in compliance with this section and sections [302, 306, 307, 318] and [404] of this title, the discharge of any pollutant by any person shall be unlawful." C.W.A. § 301(a), 33 U.S.C. § 1311(a).

CWA section 402 establishes the National Pollutant Discharge Elimination System (NPDES), and section 404 establishes the permit program which regulates dredged or fill material. The Environmental Protection Agency (EPA) is responsible for issuing NPDES permits, while the United States Corps of Engineers (Corps) issues dredge or fill material permits. See C.W.A. § 402(a)(1), 33 U.S.C. § 1342(a)(1) (giving authority to issue permits to Administrator of NPDES program); C.W.A. § 404(a), 33 U.S.C. § 1344(a) (giving authority to issue permits to Secretary); *Save Our Community v. EPA*, 971 F.2d 1155, 1162 n.13 (5th Cir. 1992) (delineating permit issuance and enforcement responsibilities of EPA and Corps).

Point sources which discharge pollutants are categorized so that regulations and standards of performance can be promulgated and published defining the allowable amount of effluent. See generally C.W.A. § 306, 33 U.S.C. § 1316 (defining sources to be regulated, describing categories of point sources, and enforcement mechanisms); C.W.A. § 307, 33 U.S.C. § 1317 (establishing standards and regulations for toxic pollutants); C.W.A. § 318, 33 U.S.C. § 1328 (establishing standards and regulations for aquaculture). When point sources discharge pollutants

### 1. Activities on Federal Lands Under Section 401

CWA establishes the National Pollutant Discharge Elimination System (NPDES) by requiring that a federal permit be obtained for any activity on federal lands which may result in the “discharge of a pollutant” pursuant to section 402.<sup>27</sup> Under section 401,<sup>28</sup> the ap-

which interfere with the “attainment or maintenance” of a given body of water, effluent limitations must be established restricting the amount of discharge to amounts that will reduce the amount of pollutant and maintain the appropriate level of pollutants required to meet CWA’s goal. See generally C.W.A. § 302, 33 U.S.C. § 1312; see also *E.I. du Pont*, 430 U.S. at 129 (describing purpose of effluent limitations and deciding EPA must establish effluent limitations, stating, “In sum, the language of the [Act] supports the view that [section] 301 limitations are to be adopted by the Administrator, that they are to be based primarily on classes and categories, and that they are to take the form of regulations”).

The National Pollutant Discharge Elimination System (NPDES) is addressed in section 402 of the Act. See *id.* C.W.A. § 402, 33 U.S.C. § 1342. NPDES is “the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits . . .” 40 C.F.R. § 122.2 (1998). NPDES permits do not regulate discharges of sludge or fill materials or “pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands . . . [and] [r]eturn flow from irrigated agriculture.” 40 C.F.R. § 122.3 (e)-(f); see also *E.I. du Pont*, 430 U.S. at 116 (noting elimination of all pollutant discharges into nation’s waters as goal in enacting CWA); *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 645 (2d Cir. 1993) (summarizing CWA’s “basic rule” from juxtaposition of sections 301(a) and 402(a)(1) (quoting C.W.A. § 301(a), 33 U.S.C. § 1311(a))), *cert. denied* by *United States v. Villegas*, 512 U.S. 1245 (1994).

Dredge and fill materials, and sewage sludge, are regulated under section 404 of the Act. See 40 C.F.R. § 122.3 (b); see also C.W.A. §§ 404-405, 33 U.S.C. §§ 1344-1345; *Save Our Community*, 971 F.2d at 1162 (“Specific authorization includes the discharge of ‘dredged or fill material’ pursuant to a permit issued under section 404 of the CWA.”) (citing C.W.A. § 404(a), 33 U.S.C. § 1344(a)).

27. See C.W.A. § 402, 33 U.S.C. § 1342. Section 402 regulates effluents when EPA issues a permit for point source discharges. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) (characterizing NPDES program as “a federal permit program designed to regulate the discharge of polluting effluents”) (citing C.W.A. § 402, 33 U.S.C. § 1342; *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205-08 (1976)); see also *Plaza Health*, 3 F.3d at 645 (characterizing NPDES permits as “largest exception to [section 301(a)’s] seemingly absolute rule”). The United States Supreme Court summed up the operation of a permit issued pursuant to section 402, stating, “In short, the permit defines, and facilitates compliance with and enforcement of, a preponderance of a discharger’s obligations under the Amendments.” *State Water Resources Control Bd.*, 426 U.S. at 205 (noting focus of effluent limitations is on category or class not characteristics of individual point sources). NPDES permit holders must comply with all conditions set forth in the permit. See C.W.A. § 402(a), 33 U.S.C. § 1342(a). NPDES permits contain specific limitations on the allowable amount of pollution which may be emitted from a particular point source of pollution. See *International Paper*, 479 U.S. at 489 (explaining CWA’s 1972 Amendments). In addition, requirements other than effluent limitations may be added if necessary to carry out the purpose of CWA. See C.W.A. § 402(a)(1), 33 U.S.C. § 1342(a)(1). Further, a “compliance schedule for the attainment of these limitations” is included. *International Paper*, 479 U.S. at 489. Section 301 defines the effluent limitations which the point sources must comply with. See *E.I. du Pont*, 430 U.S. at 112 (interpreting section 301, noting section 301 defines point source effluent limitation requirements).

plicant must also apply for and receive state certification before a

Although federal NPDES permit holders do not have to comply with state NPDES schedules of compliance, they must comply with state water quality standards, even those more stringent than the NPDES permit requirements, which are incorporated into the federal NPDES permit. See C.W.A. § 402(a)(3), 33 U.S.C. § 1342(a)(3) (“[P]ermits . . . shall be subject to the same terms, conditions, and requirements as apply to a State permit program . . .”); *State Water Resources Control Bd.*, 426 U.S. at 227-28 (holding NPDES permit holders are not required to comply with state NPDES compliance schedules); *International Paper*, 479 U.S. at 489-90 (noting “source State may require discharge limitations more stringent than those required by the Federal Government”); *Arkansas v. Oklahoma*, 503 U.S. 91, 92 (1992) (deferring to EPA’s requirement activities issued NPDES permit must comply with state requirements); *United States Steel Corp. v. EPA*, 556 F.2d 822, 835 (7th Cir. 1977) (recognizing requirement NPDES permits contain state water quality standards). For an explanation as to the means to develop and enforce effluent limitations, see generally *E.I. du Pont*, 430 U.S. 112 (1977); *Citizens for a Better Env’t-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111 (9th Cir. 1996); *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990).

Supreme Court decisions addressing the scope, and interpretation, of CWA include *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994); *Arkansas*, 503 U.S. 91 (1992); *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992); *International Paper*, 479 U.S. 481 (1987); *Chemical Manufacturers Ass’n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981); *City of Milwaukee*, 451 U.S. 304 (1981); *EPA v. National Crushed Stone Ass’n*, 449 U.S. 64 (1980); *E.I. du Pont*, 430 U.S. 112 (1977); *State Water Resources Control Board*, 426 U.S. 200 (1976). For the Supreme Court’s interpretation of CWA section 301 concerning effluent limitations, see generally *E.I. du Pont*, 430 U.S. 112 (1977). For the Ninth Circuit’s interpretation of section 301, see *infra* note 38. For the Supreme Court’s interpretation of CWA section 402, see *E.I. du Pont*, 430 U.S. at 119-20; *State Water Resources Control Board*, 426 U.S. at 205-209.

Each state is required to create and adopt appropriate water quality standards for each body of water within its boundaries, identify the uses of each body of water, and determine the amount of pollution which would impair these uses. See C.W.A. § 303, 33 U.S.C. § 1313 (describing state’s responsibility under CWA and guidelines for establishing water quality standards). For a further description of the elements comprising water quality standards, see generally *PUD*, 511 U.S. 700 (1994); Adler, *supra* note 10; Randolph L. Hill, *State Water Quality Certification of Federal NPDES Permits*, 9 TUL. ENVTL. L.J. 1 (1995).

For a discussion of states’ obligations under CWA section 303, see generally Conway, *supra* note 8; Hill, *supra*. For an example of how the United States Supreme Court and the Ninth Circuit have interpreted CWA section 303, see *infra* notes 35-42 and accompanying text.

28. See C.W.A. § 401, 33 U.S.C. § 1341.

The plain language of the Act provides:

Any applicant for a Federal license or permit to conduct *any activity* . . . which may result in *any discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge shall comply with the applicable provisions of [CWA] . . . . No license or permit shall be granted until the certification required by this section has been obtained. . . . No license shall be granted if certification has been denied by the State . . . . C.W.A. § 401(a)(1), 33 U.S.C. § 1341(a)(1) (emphasis added).

For a discussion of the Supreme Court’s interpretation of section 401, see *infra* notes 35-42 and accompanying text. For a discussion of the Ninth Circuit’s



federal license or permit may be issued from the United States Environmental Protection Agency (EPA).<sup>29</sup> Thus, the states have the opportunity to assess whether the proposed activity will comply with their water quality standards.<sup>30</sup> The state permit requirement, however, applies only to those activities which require a federal permit and fall within the definition of the term "discharge" as defined by

interpretation of section 401 prior to *ONDA II*, see *infra* notes 43-47 and accompanying text.

29. See C.W.A. § 401(a)(1), 33 U.S.C. § 1341(a)(1); see also *Arkansas*, 503 U.S. at 103 ("Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured."); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) (explaining legislature intended to leave regulation of dams under state control absent clear intent to contrary). For a discussion of the facts and court rationale in *National Wildlife*, see *infra* note 50.

30. See, e.g., *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 707-08 (1994) (reviewing state responsibilities under CWA) (citing C.W.A. § 401, 33 U.S.C. § 1341). For an in-depth discussion of the facts, procedural history and analysis in *PUD*, see *infra* notes 35-42 and accompanying text.

In enacting CWA, Congress specifically recognized that the states have the responsibility of maintaining the integrity of the waters located within their boundaries. See C.W.A. § 101(b), 33 U.S.C. § 1251(b). Congress's policy is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources . . ." *Id.* The states are required to set water quality standards for all navigable waters within their boundaries. See C.W.A. § 303(c), 33 U.S.C. § 1313(c); see also C.W.A. § 303(c)(2), 33 U.S.C. § 1313(c)(2) (describing purpose of water quality standards); 40 C.F.R. §§ 131.5, 131.11 (describing how to establish water quality program); *PUD*, 511 U.S. at 714 (noting CWA section 303(c)(2)(A) requires states to establish antidegradation measures). Further, Congress appointed the EPA as the Administrator of the Act to help states achieve CWA's goal. See C.W.A. § 1251(d), 33 U.S.C. § 1251(d). For example, EPA is responsible for assessing which states have the capacity to implement a permit program that will meet CWA's standards, and monitor state compliance. See C.W.A. § 402, 33 U.S.C. § 1342. In addition, EPA is responsible for overseeing the development of technology, which serves to reduce discharges into the nation's water, and establishing and applying enforcement mechanisms. See C.W.A. §§ 301, 304, 33 U.S.C. § 1311, 1314. Only if a state cannot meet water quality standards will EPA promulgate federal standards for the state. See C.W.A. § 303(c)(3), 33 U.S.C. § 1313(c)(3).

An activity subject to section 401 review, pursuant to section 402, means that the permit holders must comply with the water quality standards set by the state. See *State Water Resources Control Bd.*, 426 U.S. at 220-21 (discussing relationship between CWA section 401 and 402); see also *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987) ("The CWA therefore establishes a regulatory 'partnership' between the Federal Government and the source State."). For a discussion of the operation of 401 review, see generally Donahue, *supra*, note 8; Hill, *supra* note 27. For further discussion of EPA's role in administering CWA, see *infra* note 81. For judicial decisions addressing deference due EPA as Administrator of CWA, see generally *PUD*, 511 U.S. 700 (1994); *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993); *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842 (9th Cir. 1987); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

the Act.<sup>31</sup> The term “discharge” has traditionally been interpreted to include only point sources of pollution.<sup>32</sup> Point sources of pollution are directly regulated by CWA under the permit provisions, including section 401.<sup>33</sup> In contrast, nonpoint sources of pollution are only regulated indirectly through other provisions of CWA and are not subject to section 401 review.<sup>34</sup> Thus, defining what consti-

31. See C.W.A. § 401(a)(1), 33 U.S.C. § 1341(a)(1); see also *PUD*, 511 U.S. at 709 (setting forth requirements triggering section 401 certification). For the statutory language defining the term “discharge,” see *infra* note 49 and accompanying text.

32. See, e.g., *Idaho Conservation League v. Caswell*, No. CV 95-394-S-MHW, 1996 WL 938215, at \*8 (D. Idaho Aug. 12, 1996) (holding USFS did not violate CWA when issued permit for construction of forest logging road without requiring state certification). For a discussion of the facts, holding and analysis in *Idaho Conservation*, see *infra* notes 43-47 and accompanying text.

33. See *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1315 (D. Or. 1997) (“The CWA’s primary mechanism for regulating the addition of pollutants to navigable waters is the [NPDES] permit . . . which allows regulated discharges of pollutants notwithstanding the Act’s general prohibition, so long as the discharger complies with all applicable limitations.”) (citing C.W.A. § 402(a)(1), 33 U.S.C. § 1342(a)(1)); *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1174 (D. Mont. 1995) (noting categorical prohibition of discharge of pollutants from point sources without NPDES permit) (citing CWA § 301(a), 33 U.S.C. § 1311(a); *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993)).

34. Cf., e.g., *Idaho Conservation*, 1996 WL 938215, at \*9 (holding construction of forest logging road is nonpoint source not subject to 401 review). But cf. *Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534, 1541 (D. Or. 1996) (holding nonpoint sources are regulated under section 401), *rev'd sub nom.* *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998). Prior to FWPCA, no statute was in place to regulate water pollution. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987) (noting federal common law addressed water pollution). In 1948, FWPCA was enacted, with the stated purpose “to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.” *EPA v. California ex. rel. State Water Resources Control Bd.*, 426 U.S. 200, 203 n.8 (1976) (quoting 33 U.S.C. § 1151(a)). The method used to address water pollution under this scheme centered around defining acceptable levels of pollution for each individual body of water. See *id.* at 202 (describing CWA prior to 1972 Amendments); *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990) (defining water quality standards, “standards set by the states specifying the tolerable degree of pollution for particular waters”) (citation omitted). In 1970, section 401(a) was enacted as section 21(b) of the Water Quality Improvement Act (WQIA). See *Idaho Conservation*, 1996 WL 938215, at \*8. Section 21(b) prohibited “any discharge” into the nation’s waters by any activity without state certification. See *id.* The term “discharge” in “any discharge” was not defined by WQIA. See *id.* In 1972, however, Congress added the definitions of “discharge” and “discharge of a pollutant.” See *id.* Congress amended CWA in 1972 because “‘the Federal Water pollution control program . . . [was] inadequate in every vital respect.’” *State Water Resources Control Bd.*, 426 U.S. at 203 (quoting S. Rep. No. 92-414, U.S. Code Cong. & Admin. News 1972, p. 3674, 2 Leg. Hist. 1425, and discussing inadequacy of water quality standards in controlling pollution). The United States Supreme Court has interpreted Congress’s intention in amending CWA as to “‘establish an all-encompassing program

of water pollution regulation," *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981), by adopting "comprehensive amendments to the Act." *International Paper*, 479 U.S. at 488. The 1972 Amendments have also been interpreted as shifting water pollution control from water quality standards to "national technology standards for point sources of pollution." Conway, *supra* note 8, at 85 (citation omitted); see, e.g., *NRDC*, 915 F.2d at 1316-17 (concluding nonpoint sources of pollution are regulated only indirectly because 1972 CWA Amendments replaced previous regulatory scheme). In addition, the 1972 Amendments have been cited as support for the proposition that the Act only regulates point sources of pollution by virtue of the addition of definitions for the terms "discharge" and "discharge of a pollutant." See, e.g., *Idaho Conservation*, 1996 WL 938215, at \*8-9 (holding CWA section 401 does not regulate nonpoint sources).

The Ninth Circuit has recognized that nonpoint sources of pollution are regulated indirectly through separate provisions of CWA. See, e.g., *NRDC*, 915 F.2d at 1316, 1316 n.3 (concluding lack of penalty for nonpoint source polluters failure to adopt nonpoint source management controls supported conclusion "discharge of pollutants from nonpoint sources . . . [are] not directly prohibited"); *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 850 (9th Cir. 1987) ("Nonpoint sources, because of their very nature, are not regulated under the NPDES."); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (noting nonpoint sources of pollution "are not subject to NPDES permit requirements; rather, the Act directs the Administrator only to develop guidelines for identifying and controlling such sources"); see also *Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988) (concluding lack of direct mechanism under CWA for EPA to mandate states adopt appropriate nonpoint controls due to Congress's recognition "uniform federal regulation was virtually impossible," not concern for state authority); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165-66, 183 (D.C. Cir. 1982) (describing, and deferring to, EPA's view which asserted CWA regulates point sources of pollutants through section 402, nonpoint sources of pollution through section 208, "[t]he latter category [being] defined by exclusion and includ[ing] all water quality problems not subject to [section] 402"); *United States v. Earth Sciences, Inc.*, 559 F.2d 368, 373 (10th Cir. 1979) ("It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived.").

The purpose of the Amendments, however, was to limit effluents from point sources "as well as achiev[e] acceptable water quality standards." *State Water Resources Control Bd.*, 426 U.S. at 204 (reviewing Congress's purpose in enacting 1972 Amendments) (emphasis added). Though establishing "direct restrictions on discharges," the Amendments did not abandon the control of water pollution through water quality standards, leaving control to the states, but added additional means of regulation. *Id.* (specifying Amendments' aim to limit effluents "as well as achieving acceptable water quality standards"); see also *NRDC*, 915 F.2d at 1316 ("The amendments placed certain limits on what an individual firm could discharge, regardless of whether the stream into which it was dumping was overpolluted at the time.").

The Ninth Circuit recognized that the addition of effluent limitations was not intended to replace the previous regulatory scheme, but rather was intended as an improvement in enforcing maintenance of water quality standards, in *Northwest Environmental Advocates v. City of Portland*. See *Northwest Env'tl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995), *reh'g denied*, 74 F.3d 945 (9th Cir. 1995), *and cert. denied*, 518 U.S. 1018 (1996). But cf. *NRDC*, 915 F.2d at 1316; *ONRC*, 834 F.2d at 849 (interpreting 1972 Amendments as establishing dual regulatory scheme in which only point sources are directly regulated). In *Northwest Environmental Advocates*, an environmental group alleged that the City of Portland violated CWA when untreated raw sewage flows, known as CSOs, overflowed from the city sewer system when it rained, because the overflow was not covered by the NPDES permit issued by EPA. See *Northwest Env'tl. Advocates v. City of Portland*, 56 F.3d

tutes a discharge is pivotal in delineating the states' power to enforce water quality standards within their boundaries.

979, 980 (9th Cir. 1995), *reh'g denied*, 74 F.3d 945 (9th Cir. 1995), *and cert. denied*, 518 U.S. 1018 (1996). The *Northwest Environmental Advocates* court held that the environmental group could sue to force the CSOs to comply with Oregon water quality standards even though no effluent limitations were set for the CSOs in the NPDES permit. *See id.* at 986 (reconsidering their decision in *Northwest Environmental Advocates v. City of Portland*, 11 F.3d 900 (9th Cir. 1993) affirming district court's holding CWA does not allow citizens to enforce water quality standards). The *Northwest Environmental Advocates* court specifically stated, "[A]lthough the district court] concluded that violations of water quality standards may be actionable 'only if they are incorporated into an NPDES permit through effluent limitations' . . . [b]ecause the plain language of CWA [section] 505, the legislative history, and case law support a finding of citizen suit jurisdiction in this case, we reverse on this issue." *Id.* at 986 (internal citation omitted).

The City of Portland argued that effluent limitations, established by CWA's 1972 Amendments, were intended by Congress to become the primary means to achieve water quality standards. *See id.* The *Northwest Environmental Advocates* court reviewed the legislative history to the 1972 Amendments and concluded that "[i]n fact, the legislative history indicates just the opposite." *Id.* The Ninth Circuit explained that Congress's main concern was the underutilization of allowable legal action to enforce water quality standards. *See id.* at 986-87 (highlighting Senate Committee's discussion of "dual purpose of water quality standards" (quoting S. REP. NO. 414, 92nd Cong.; 2nd Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671; 40 C.F.R. § 131.2 (1992))). The Senate Committee specifically noted that "'only one case has reached the courts in more than two decades.'" *See id.* (quoting 1972 U.S.C.C.A.N. at 3672). Further, the Ninth Circuit concluded that Congress did not intend CWA's enforcement provisions be limited to violations of effluent limitations because the Senate Committee expressly recognized that a violation of effluent limitations was only *one* basis for a citizen suit. *See id.* at 987. Thus, any pollution affecting water quality standards, including nonpoint source pollution such as the CSOs overflow caused by rainfall, is subject to CWA's direct regulatory provisions. *Cf. id.* at 989 (discussing Congress's recognition regulation is not dependant upon whether effluent limitations may be developed). The Ninth Circuit explained that although the CSOs overflows resulted from "uncontrollable events," and many pollutants affecting water quality standards are not amenable to effluent limitations, requiring the pollution sources of these pollutants to meet water quality standards through citizen suits "effectuate[s] complementary provisions of CWA and the underlying purpose of the statute as a whole." *Id.* (noting pollutants not amenable to effluent limitations remain subject to direct regulation "[e]ven after the 1972 amendments").

For the proposition that the Ninth Circuit's decision in *Northwest Environmental Advocates* overruled its prior decision in *ONRC*, see *infra* note 189 and accompanying text. For a discussion of the Ninth Circuit's opinion in *ONRC*, prior to *Northwest Environmental Advocates* and *PUD*, reviewing, and interpreting, CWA's 1972 Amendments impact on pollution source regulation, see *infra* note 38. For an in-depth discussion of two Ninth Circuit district courts interpreting the 1972 CWA Amendments in light of the issue before them, and reaching opposite conclusions regarding whether nonpoint sources fall within the ambit of section 401, see *infra* notes 43-47 and accompanying text. For a discussion of the impact of CWA's 1972 Amendments, see generally *City of Milwaukee*, 451 U.S. 304 (1981); *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112 (1977); *State Water Resources Control Bd.*, 426 U.S. 200 (1976); *Train v. City of New York*, 420 U.S. 35 (1975); Conway, *supra*, note 8.

2. *Scope of States' Power of Review Under Section 401: PUD No. 1 of Jefferson County v. Washington Department of Ecology*

The Supreme Court addressed the scope of states' power under section 401 in *PUD No. 1 of Jefferson County v. Washington Department of Ecology (PUD)*.<sup>35</sup> The Court examined whether states could impose additional requirements or restrictions on activities requiring certification under section 401.<sup>36</sup> Specifically, the Washington State Department of Ecology imposed minimum stream flow rates as part of the certification under CWA for building a hydroelectric power plant.<sup>37</sup> The Court held "that the State may include minimum stream flow requirements in a certification issued pursuant to [section] 401 of the Clean Water Act insofar as necessary to

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35. 511 U.S. 700 (1994). The Court began its analysis by defining the role of EPA and the state in accomplishing the Act's goals. *See id.* at 704. The states are required by CWA to submit a proposal to EPA which establishes water quality standards. *See id.* at 704-05 (citing C.W.A. §§ 301(b)(1)(C), 303; 33 U.S.C. §§ 1311(b)(1)(C), 1313). In addition, states are responsible for enforcing these standards on intrastate waters under CWA section 309(a) and, under section 401, are required to "provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters." *Id.* at 707 (citing C.W.A. §§ 309(a), 401; 33 U.S.C. §§ 1319(a), 1341).

36. *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 710 (1994) (stating specific issue as "whether the minimum stream flow requirement that the State imposed on the Elkhorn [hydroelectric] Project is a permissible condition of a [section] 401 certification under [CWA]"). In *PUD*, a local utility service and a city planned to build a hydroelectric plant near the Olympic National Forest on the Dosewallips River. *See id.* at 708. The river water would be blocked from flowing through 1.2 miles of the river in order to generate electricity. *See id.* at 708-09. The water would be withdrawn, sent through turbines at the plant, then redeposited in the river below the 1.2 mile area from which it was diverted from. *See id.* As a result, the amount of water flowing through the 1.2 mile portion of the river would be less than the amount required by state water quality standards. *See id.* at 709. The state required that these water levels be increased before approving the project discharges. *See id.*

The proposed hydroelectric plant could potentially discharge several pollutants, thus requiring state certification before the project could proceed. *See id.* at 711. The state conditioned the issuance of the permit on maintaining a certain level of water flow through the river. *See id.* at 709. Since this requirement was unrelated to the discharge of pollutants, a dispute arose over whether the state may impose minimum stream flow requirements. *Cf. id.* at 711 (declining to dispute petitioners' assertion minimum flow requirement was unrelated to specific discharges). Both parties conceded that two "discharges" could occur; thus, the project required section 401 certification. *See id.* The first discharge might occur from the construction of the plant, resulting in the release of dredge and fill material; the second discharge could occur when the water was redeposited via a tail-race into the river. *See id.*

For a discussion of whether redepositing of releases falls within the definition of discharge, see *infra* note 62 and accompanying text.

37. *See id.* at 700.

enforce a designated use contained in a state water quality standard.”<sup>38</sup> Thus, once an applicant’s activity falls within the purview

38. *Id.* at 723. This holding further defines the scope of section 401 by concluding that states may require limitations “to ensure compliance with state water quality standards or any other ‘appropriate requirement of State law,’” and that minimum stream flow conditions are an appropriate requirement of state law. Donahue, *supra* note 8, at 209 (explaining *PUD* court’s holdings relevant to CWA section 401’s scope (quoting *PUD*, 511 U.S. at 712 (quoting C.W.A. § 401(a), 33 U.S.C. § 1341(a))); see also *PUD*, 511 U.S. at 713). The Court set out the relevant language to be interpreted:

“Section 401, as set forth in 33 U.S.C. [section] 1341, provides in relevant part:

‘(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in *any discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections [301, 302, 303, 306], and [307] of this title.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section *shall set forth any effluent limitations and other limitations*, and monitoring requirements necessary to assure that *any applicant* for a Federal license or permit *will comply with any applicable effluent limitations and other limitations*, under section [301] or [302] of this title, standard of performance under section [306] of this title, or prohibition, effluent standard, or pretreatment standard under section [307] of this title, *and with any other appropriate requirement of State law set forth in such certification*, and shall become a condition on *any Federal license or permit* subject to the provisions of this section.’”

*PUD*, 511 U.S. at 708 n.2 (quoting C.W.A. § 401(a), (a)(1) & (a)(1)(d), 33 U.S.C. § 1341(a), (a)(1) & (a)(1)(d)) (emphasis added).

The Court rejected petitioners’ argument that section 401 only applied to discharges. *See id.* at 711. Section 401(a) requires “any discharge” to be in compliance with applicable provisions of the Act. *See id.* The language of section 401(d) “refers to the compliance of the *applicant*, not the discharge.” *Id.* (emphasis added). Thus, a state “may impose ‘other limitations’ on the project . . . to assure compliance with . . . [CWA] and with ‘any other appropriate requirement of State law.’” *See id.* The Court therefore concluded, “Section 401(a)(1) identifies the category of activities subject to certification - namely, those with discharges. And [section] 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.” *Id.* at 711-12. Because section 401(d) requires an “applicant,” and not a “discharge,” to comply with various provisions of CWA, “the State may [ ] impose water quality limitations [which are not] specifically tied to a ‘discharge.’” *Id.* at 726.

The Court further noted that EPA’s regulations paralleled its own interpretation of this provision; thus, the regulations were entitled to deference. *See id.* at 712-13 (citing 40 C.F.R. § 121.2(a)(3) (1992)). EPA’s implementing regulations for section 401 require the state to find that any activity will not violate water quality standards. *See id.* at 712 (quoting 40 C.F.R. § 121.2(a)(3) (1993)). Further, EPA concluded that section 401 mandates that *activities*, not discharges, must comply with state water quality standards. *See id.* Because EPA’s interpretation of section 401 was reasonable, the *PUD* court concluded it was entitled to deference. *See id.* (providing as examples precedent in *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.

(1984)). Under CWA section 303, individual states are required to promulgate and maintain water quality standards aimed at protecting designated uses. *See id.* Further, imposing conditions or limitations in furtherance of this mandate under the Act, is an obligation of the state. *See id.* Thus, 401(d) "authorizes the State to place restrictions on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 712-13 (qualifying restrictions to effluent limitations, relevant CWA provisions, and state law requirements deemed appropriate) (emphasis added). The *PUD* court agreed that a proper function of 401 certification is ensuring activities comply with CWA section 303. *See id.* at 712. The Court did recognize that, unlike section 401(a), section 401(d) does not list section 303. *See id.* at 712-13. As such, it could be argued that the "activity" would not have to comply with state water quality standards. *Cf. id.* (declining to adopt this interpretation). The Court further noted, however, that states may impose limitations in order to comply with section 301, and because section 301 incorporates section 303, water quality standards are "other limitations" 401 may require activities to comply with pursuant to section 401(d). *See id.* at 713 (citing C.W.A. § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); H.R. Conf. Rep. No. 95-830, p.96 (1997), U.S. Code Cong. & Admin. News 1977, pp. 4326, 4471). In addition to complying with effluent limitations for point sources, under section 301(b)(1)(C), compliance with "any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations . . ." is required. C.W.A. § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (emphasis added). The *PUD* court explicitly noted that section 301 is not limited to discharges. *See PUD*, 511 U.S. at 713 n.3. Section 301(b)(1)(C) "expressly refers to state water quality standards, and is not limited to discharges." *Id.* The Court did note that some discharges are prohibited by section 301(a), but stated that section 301(a) "also contains a broad enabling provision which requires States to take certain actions '[i]n order to carry out [CWA's] goal' . . . [including] any more stringent limitation, including those necessary to meet water quality standards, . . . established pursuant to any State law or regulations . . ." *Id.* (quoting C.W.A. § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C)). Similarly, section 401(d)'s reference to "any other appropriate requirement of State law" also may include water quality standards.

*See id.* at 701. In conclusion, the *PUD* court, though declining to state what laws or regulations section 301 contemplates, did state that, "state quality standards adopted pursuant to [section] 303 are among the 'other limitations' with which a State may ensure compliance through the [section] 401 certification process. . . [and] at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to [section] 303 are 'appropriate' requirements of state law." *Id.* at 713.

The Ninth Circuit also examined and construed section 301(b)(1)(C) in *Oregon Natural Resources Council v. United States Forest Service (ONRC)*, and concluded that section 301 only applies to regulation of discharges. *Cf. Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987) (addressing CWA section 301(b)(1)(C) language "any applicable water quality standards established pursuant to this chapter" and concluding section 301 only regulates point sources of pollution). The *ONRC* court held that the language in section 301(b)(1)(C) did not entitle citizens "to sue under the citizen suit provision of the Act to enforce state water quality standards affected by nonpoint sources." *Id.* The *ONRC* court provided "runoff from irrigated agriculture and silvicultural activities" as examples of nonpoint source pollution. *See id.* (citing as support *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)). Thus, in contrast to the *PUD* court, the *ONRC* court concluded that, by implication, only discharges are regulated, as discharges only emanate from point sources of pollution. *See id.* Further, the *ONRC* court found that the dual regulatory scheme present in CWA lends support for its conclusion. *See id.*

In *ONRC*, the United States Forest Service (USFS), charged with overseeing national forests, sold land in the Willamette Timber National Forest to a private company, Bugaboo, for timber harvesting. *See id.* at 844. The sale at issue was called the North Roaring Devil timber sale. *See id.* at 843-44. In addition, USFS issued a permit for the timber harvesting and associated activities which included the construction of a bridge and road. *See id.* at 848. Three issues were on appeal before the *ONRC* court. *See id.* at 843-44 (enumerating plaintiffs' appeals for Bugaboo's activities, claiming Administrative Procedure Act, National Environmental Policy Act and CWA violations). The issue relevant to the discussion in this Note involves Bugaboo's alleged violation of CWA in building a bridge and logging road which violates Oregon's water quality standards. *See id.* at 844. Plaintiffs-appellants include an environmental association, called the Oregon Natural Resources Council (ONRC), Breitenbush Community, Inc., and a private individual Michael Donnelly (collectively ONRC). *See id.* at 843. ONRC sued USFS to enjoin Bugaboo's activities, claiming the activities would violate the state of Oregon's water quality standards, and CWA section 313. *See id.* at 848. Specifically, defendants were alleged to "have violated and plan to violate" Oregon's antidegradation plan. *See id.* at 848 n.6. Defendants responded that CWA does not allow a citizen suit for enforcement of water quality standards unless the water quality standards are contained in an NPDES permit. *See id.*

Section 303 addresses water quality standards and implementation plans. *See* C.W.A. § 303(a), 33 U.S.C. § 1313(a). Section 303(a)(3)(A) requires each state to adopt water quality standards for all waters within its boundaries. *See* C.W.A. § 303(a)(3)(A), 33 U.S.C. § 1313(a)(3)(A). In addition, states must have these water quality standards approved by EPA. *See id.* These water quality standards must be reviewed at least once every three years. *See* C.W.A. § 303(c)(1), 33 U.S.C. § 1313(c)(1). States must monitor their waters so that if, or when, effluent limitations are no longer effective in maintaining water quality standards, they can be modified. *See* C.W.A. § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A). Effluent limitations based on total maximum daily loads for pollutants which meet and maintain water quality standards must be established by the state. *See* C.W.A. § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). Effluent limitations are "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of contiguous zone or the ocean from any point source other than a vessel or other floating craft." C.W.A. § 502(11), 33 U.S.C. § 1362(11). Any modifications to water quality standards for a waterbody must specify the designated water uses of the water, and "the water quality criteria for such waters based on these uses." C.W.A. § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). The guidelines states must follow in establishing these new water quality standards mandate that water quality standards "be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes. . . ." *Id.* Section 313 addresses the control of pollution for federal facilities. C.W.A. § 313, 33 U.S.C. § 1323. Any federal agency, department or instrumentality of the federal government who oversees any facility or property, or conducts an activity which results, or may result, "in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements." C.W.A. § 313(a), 33 U.S.C. § 1323(a).

As a threshold issue, the *ONRC* court noted that all parties conceded that CWA sections 301(a) and 301(b)(1)(A) and (B) only apply to point sources. *See ONRC*, 834 F.2d at 848-49. Further, the parties conceded that the activities in question would produce pollution from nonpoint sources. *Cf. id.* at 848-49 (conceding CWA section 301(a) specifically refers to point source discharges which were not at issue). Thus, the *ONRC* court was never called upon to determine whether the logging activities and construction in question were point or nonpoint sources of pollution. *Cf. id.*; *see also PUD*, 511 U.S. at 710 (explaining analysis Court would



apply in resolving issue presented). The Ninth Circuit characterized the specific issue they were asked to address as whether section 301(b)(1)(C)'s "additional enforceable standards, including state water quality standards can be applied to pollution from nonpoint sources." *ONRC*, 834 F.2d at 849. *ONRC* claimed that because states are required to establish and maintain water quality standards, and section 301(b)(1)(C) references water quality standards with no mention of point sources, they "are entitled to sue under the citizen suit provision of [CWA] to enforce state water quality standards." *Id.* In a footnote, the *ONRC* court elaborated on the term "nonpoint source pollution" as explained by the Ninth Circuit in *Trustees for Alaska*. *See id.* at 849 n.9. "Nonpoint source pollution is not specifically defined by the Act, but is pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source. Examples of nonpoint source pollution include runoff from irrigated agriculture and silvicultural activities." *Id.* (citing as support *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (quoting C.W.A. § 304(f)(2)(B), 33 U.S.C. § 1314(f)(2)(B))). To accomplish this objective, *ONRC* asserted that USFS should have required Bugaboo to apply for state certification before issuing their permit. *See ONRC*, 834 F.2d at 849.

It is interesting to note that in *Trustees for Alaska*, the Ninth Circuit did not, in fact, specifically quote language from the subsection of 304(f)(2) referencing agricultural and silvicultural activities. *See Trustees for Alaska*, 749 F.2d at 558 (quoting subsection of 304(f)(2) concerning mining activities). Section 304(f)(2)(A) requires that published information regarding the development of water quality criteria, pursuant to CWA section 304(a), include the means of controlling pollution which results from "agricultural and silvicultural activities including runoff from fields and crop and forest lands." C.W.A. § 304(f)(2)(A), 33 U.S.C. § 1314(f)(2)(A). The Ninth Circuit in *Trustees for Alaska* quoted section 304(f)(2)(B) which lists "mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines" as activities requiring water quality control method information be developed and published. *Trustees for Alaska*, 749 F.2d at 558 (concluding mining sources of pollution may be subject to NPDES regulation despite being listed in CWA section 304(f)(2)(B) (quoting C.W.A. § 304(f)(2)(B), 33 U.S.C. § 1314(f)(2)(B))).

Contrary to the *Trustees for Alaska* court's conclusion that some nonpoint sources of pollution may in fact be regulated under the NPDES permit provision, looking to Congress's creation of two discrete programs in addressing pollution under CWA and the title of section 301, "Effluent Limitations," the *ONRC* court held that the NPDES does not regulate nonpoint sources of pollution. *See ONRC*, 834 F.2d at 849. The *ONRC* court did recognize that nonpoint source pollution "constitutes a major source of pollution in the nation's waters." *Id.* (citing V. NOVOTNY & G. CHESTERS, *HANDBOOK OF NONPOINT POLLUTION* 2 (1981) (asserting nonpoint sources of pollution account for more than 50% of the total water quality problem)). The *ONRC* court nonetheless concluded that *ONRC* was not entitled to sue under CWA to enforce nonpoint source pollution affecting state water quality standards. *See id.* at 849, 851 ("[P]laintiffs cannot enforce state water quality standards with respect to nonpoint sources pursuant to [CWA's citizen suit provision] that section because Congress did not so provide. Thus, plaintiffs have no exclusive and comprehensive remedy in the citizen suit provision of the Act. . .").

The *ONRC* court cited three sections of CWA in support of its reading of a separate regulatory scheme which precludes regulation under CWA section 301 for nonpoint source pollution. *See id.* at 849. Section 319 of CWA specifically establishes a waste treatment program directed at nonpoint source pollution, and establishes the guidelines for state areawide treatment management programs addressing nonpoint management, while section 101(a)(7) makes control of nonpoint source pollution a policy goal of CWA. *See id.* In addition, the title of section 301, "Effluent Limitations," is defined as a restriction of pollutants "discharged from point sources into navigable waters." *Id.* at 849 (quoting C.W.A. § 502(11), 33 U.S.C. § 1362(11)) (emphasis added); *see also* 40 C.F.R. § 122.2

of section 401, the state may impose any conditions or limitations related to the activity.<sup>39</sup>

(1998) (defining effluent limitations as “any restriction . . . on quantities, discharge rates, and concentrations of ‘pollutants’ which are ‘discharged’ from ‘point sources’”).

The *ONRC* court first addressed section 319, reviewing the 1972 and 1987 Amendments to CWA. *See ONRC*, 834 F.2d at 849. In 1972, Congress made two major changes to CWA: it established the NPDES permit program and “concomitantly created a new approach to regulating and abating water pollution, [drawing] a distinct line between point and nonpoint sources of pollution.” *Id.* Under this dual regulatory scheme, point sources of pollution are to be regulated by NPDES. *See id.* at 849 (citing C.W.A. § 402, 33 U.S.C. § 1342); 849 n.11 (quoting definitions of discharge and “discharge of a pollutant” as support). Nonpoint sources of pollution, however, are to be addressed indirectly through new, separate, provisions of the Act. *See id.* Regulation of nonpoint sources are voluntary, being accomplished through waste treatment management plans. *See id.* at 849 (asserting nonpoint sources of pollution not regulated under NPDES program). Further, in 1987, Congress provided for grants and assistance to be given to states that develop nonpoint source programs. *See id.* at 849 n.12 (discussing Congress’s policy for pollution control as amended in 1987 to control two distinct types of pollution, point and nonpoint source pollution).

Second, the *ONRC* court observed that section 101(a)(7) was also added in the 1987 CWA revisions. *See id.* The grants and assistance were included in the new provisions as a means to implement the new national policy concerning nonpoint source pollution stated in section 101(a)(7). *See id.* (“The new language states that: ‘(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of the Act to be met through the control of both point and nonpoint sources of pollution.’” (quoting Pub. L. No. 100-4, § 316(b), 101 Stat. 60 (Feb. 4, 1987))).

Third, the *ONRC* court construed section 301 as regulating point source, but not nonpoint source, pollution. *See id.* at 948. The *ONRC* court noted that section 301’s title, “Effluent Limitations,” is a method of controlling discharges from point sources. *See id.* (referencing CWA section 502(11) defining effluent limitations). The Ninth Circuit then briefly reviewed the three provisions of section 301(b)(1) and concluded they were *all* means of deriving these effluent limitations, including water quality standards. *See id.* at 849-50 (quoting sections 301(b)(1)(A)-(C)). According to the Ninth Circuit, effluent limitations must be complied with in order to avoid an unlawful discharge of a pollutant, explicitly prohibited by section 301(a). *See id.* at 850. Section 301(b)(1)(C) allows the use of any means necessary to comply with “effluent limitations” guidelines, “[t]hus, effluent limitations may be derived from state water quality standards and may be enforced when included in a discharger’s permit. . . . [I]t is not the water quality standards themselves that are enforceable in section [301](b)(1)(C), but it is the ‘limitations necessary to meet’ those standards, or ‘required to implement’ the standards.” *Id.* The *ONRC* court concluded, “The title and construction of section [301](b)(1) lead us to the logical conclusion that the ‘limitations’ set forth in section [301](b)(1)(C) are ‘effluent limitations’ and, therefore, by definition, applicable only to point sources. Having reached this conclusion, we find that plaintiffs do not have a cause of action under the citizen suit provision of CWA.” *Id.* (internal citation omitted). For a critical discussion of *ONRC*, proposing the Court’s decision in *PUD* overruled the Ninth Circuit’s decision in *ONRC*, see *infra* note 42. For the Ninth Circuit’s recognition that *PUD* called into question their holding in *ONRC*, see *infra* note 189.

39. *See PUD*, 511 U.S. at 713.

The Court's analysis and holding in *PUD*, while giving important insight into states' power under CWA, nonetheless leaves several important issues unsettled.<sup>40</sup> First, the Court did not address whether the two possible pollution emissions in question, "the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity," were discharges as contemplated by the Act.<sup>41</sup> Second, the Court did not discuss

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40. *Cf. id.* at 711 ("There is no dispute that petitioners were required to obtain a certification from the State pursuant to [section] 401."). See also Donahue, *supra* note 8, at 207 ("[T]he significance of [*PUD*] is twofold: it hints at an extremely broad application for [CWA] section 401, yet it leaves open or does not address several questions that must be answered to determine the precise contours of section 401's scope.").

41. *PUD*, 511 U.S. at 711 (describing two possible discharges) & 725-26 (Thomas, J., dissenting) (discussing majority opinion's focus on "'applicant,' rather than a 'discharge'" in construing section 402 and asserting that section 401 as a whole applies only to discharges); see also *North Carolina v. Federal Energy Regulatory Comm'n*, 112 F.3d 1175, 1188 (D.C. Cir. 1997) ("[*PUD*] never attempted to define a discharge and in no way indicated that an alteration of a discharge was sufficient to invoke the certification requirement of Section 401(a)(1)."), *cert. denied*, 118 S. Ct. 1036 (1998), and *cert. denied by Roanoke River Basin Ass'n v. Federal Energy Regulatory Comm'n*, 118 S. Ct. 1037 (1998); *Idaho Conservation League v. Caswell*, No. CV 95-394-S-MHW, 1996 WL 938215, at \*10 (D. Idaho Aug. 12, 1996) (noting activities in *PUD* were undisputedly discharges, and concluding, "Thus, [*PUD*] 'does not stand for the proposition that all nonpoint sources are subject to Section 401 certification'"); Donahue, *supra* note 8, at 208 n.29 ("The meaning of the operative term 'discharge' in [section] 401(a) received no attention by the [*PUD*] Court."). The court in *PUD* never discussed whether the discharges at issue emanated from a point source. See Donahue, *supra* note 8, at 217 (construing *PUD* as supporting proposition that discharge type is irrelevant for section 401 review). Donahue noted that "[t]he Court's decision was plainly not premised on the existence of any particular kind of discharge." *Id.* at 238. Indeed, one activity in question, water flowing from a dam tailrace, although traditionally held to be a point source, has in some situations been categorized as a nonpoint pollution source. See *id.* at 217; see also *North Carolina*, 112 F.3d 1175 at 1188 (noting *PUD* did not address definition of discharge or indicate discharge alterations from dam were "sufficient to invoke the certification requirement of [section] 401(a)(1)").

In his dissent, Justice Thomas asserted that the majority opinion "adopt[ed] an interpretation that fails to adequately harmonize the subsections of [section] 401." See *PUD*, 511 U.S. at 724 (Thomas, J., dissenting). Specifically, he noted, first, that the majority's interpretation contradicts the plain meaning of the statute, and second, that the majority relied in part on EPA's interpretation in reaching their conclusion without initially determining whether the language of the statute was ambiguous. In interpreting the various 401 sections, section 401(a)(1) sets forth the scope of the certification process. See *id.* at 726 (Thomas, J., dissenting). Justice Thomas asserted that the plain language of this section limits a state's 401 review to "'any discharge' that 'may result' from 'any activity.'" *Id.* at 724 (Thomas, J., dissenting) (emphasis added). Thus, only discharges must comply with the provisions of section 401, not the activity as a whole. See *id.* at 726 (Thomas, J., dissenting).

From this proper reading of the statute, Justice Thomas asserted that since section 401, pursuant to section 401(a)(1), applies to discharges, it follows that,

whether the source of the possible pollution emissions were point or nonpoint sources for purposes of determining regulation under the Act.<sup>42</sup>

reading section 401 as a whole, section 401(d) permits "other limitations" relating to discharges which an applicant must comply with. *See id.* at 726-27 (Thomas, J., dissenting). Justice Thomas concluded that, "Indeed, any broader interpretation of [section] 401(d) would permit that subsection to swallow [section] 401(a)(1)." *Id.* at 727. States would have unchecked authority to impose any conditions on an activity regardless whether the condition related to a discharge as stipulated in section 401(a)(1) and eliminate the constraints of that subsection. *See id.* at 726 (Thomas, J., dissenting).

Justice Thomas further criticized the basis of the majority's opinion which was "based at least in part upon deference to the 'conclusion' of the Environmental Agency (EPA) that [section] 401(d) is not limited to requirements relating to discharges." *Id.* at 728 (Thomas, J., dissenting). Citing to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, he criticized the majority for failing to consider whether the Act's language was ambiguous before invoking deference to EPA. *See id.* (Thomas, J., dissenting). Further, the Court should have realized that there was no EPA construction directly addressing the question of proper reconciliation between the sections 401(d) and 401(a)(1) because the Government did not seek deference to an EPA regulation in this case. *See id.* at 728-29 (Thomas, J., dissenting). Lastly, Justice Thomas noted that the only EPA regulation addressing the conditions which may appear in section 401 certifications, "speaks exclusively in terms of limiting discharges." *Id.* at 729 (Thomas, J., dissenting) (quoting 40 C.F.R. § 121.2(a)(4) (1993) (stipulating conditions relate to activity *discharge*)). He concluded that it is unclear whether this regulation is entitled to deference because it does not define the scope of section 401(d) unambiguously and in fact shows that "EPA's position on the question whether conditions under [section] 401(d) must be related to discharges is far from clear." *Id.* (Thomas, J., dissenting).

42. *Cf. PUD*, 511 U.S. at 710 ("To resolve [the principle] . . . dispute we must first determine the scope of the State's authority under [section] 401 . . . [and] then determine whether the limitation at issue here . . . falls within the scope of that authority."); *see also* Donahue, *supra* note 8, at 209 (noting *PUD* court did not consider whether two possible discharges emanated from point or nonpoint sources); Mark T. Pifher, *Water, Watersheds and the West: The Impact of the Jefferson County Decision*, 2 ENVTL. LAWYER 1, 20 n.141 (1995) (explaining *PUD* court "did not find it necessary to differentiate between point and nonpoint source discharges in reaching its decision"); Katherine P. Ransel, *The Sleeping Giant Awakens: PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 25 ENVTL. LAW 255, 266 (1995) ("The Court did not determine whether the discharge triggering the application of section 401 must be a point source discharge or whether it also includes nonpoint source discharges.").

Before beginning its analysis of section 401, the *PUD* court noted that the discharges in question must meet state water quality standards under the provision. *See PUD*, 511 U.S. at 711. The Court stated, "Because a federal license is required, and because the project may result in discharges into the Dosewallips River, petitioners are also required to obtain state certification of the project pursuant to [section] 401 of the Clean Water Act, 33 U.S.C. [section] 1341." *Id.* at 709. The Court did not discuss whether the activity in question would result in discharges from point sources as contemplated by the Act. *Cf. id.* at 725-26 (Thomas, J., dissenting) (criticizing majority opinion for failing to analyze threshold requirement of whether activity would result in discharge).

The *PUD* dissent, written by Justice Thomas, disputed the redepositing of river water from a tailrace as meeting the definition of discharge. *See id.* at 725. Justice Thomas asserted that "a minimum stream flow requirement is a limitation on in-

take - the opposite of discharge." *Id.* at 725. In concluding that section 401 did not apply to the redepositing of water into the river, and thus, that the requirement of minimum stream flow conditions was not properly within the authority of the state, the dissent concluded, "It is reasonable to infer that the conditions a State is permitted to impose on certification process must relate to the very purpose the certification is designed to serve. Thus, while [section] 401(d) permits a State to place conditions on a certification to ensure compliance of the 'applicant,' those conditions must still be related to discharges." *Id.* at 726-27; *see also* Oregon Natural Resources Council v. United States Forest Serv., 834 F.2d 842, 852 n.17 (9th Cir. 1987) (concluding section 401 may not require a permit or certification for nonpoint sources). Justice Thomas reasoned that section 401's scope is delineated by the provisions the activity must comply with, all of which address discharges. *See PUD*, 511 U.S. at 727.

The implications of the *PUD* decision are numerous but it is particularly important to determining the scope of a states' power in subjecting nonpoint source pollution to section 401 review. *See Ransel, supra*, at 268-69 (analyzing implications of *PUD* for federal permits, nonpoint source pollution, and water law and policy); *see also* Dana Leonard, Note, *PUD No. 1, Thomas, and the Future of Section 401 of the Clean Water Act: An Expansion of State Regulation*, 18 J. LAND RESOURCE & ENVTL. L. 293, 308 (1998) (concluding Congress intended expansive application of section 401). *PUD* appears to stand for the proposition that in order for states to maintain their water quality standards, they must be able to require activities causing nonpoint source pollution to comply with conditions which make it possible to meet water quality standards. *See Ransel, supra*, at 266 (remarking *PUD* court correctly interpreted term "discharge" in expansive manner). *PUD* expands the scope of section 401 to cover any activity that would negatively impact water quality standards. *See id.* at 269-70 ("Because the Court made it clear that the states can act to protect the physical and biological integrity of their waters, as well as impose conditions based on specific numeric and chemical criteria, the states' authority would seem to apply equally to nonpoint as well as to point source discharges from such activities as grazing and timber practices, as long as a federal permit or license can be said to be involved."); Leonard, *supra*, at 308 (discussing *Oregon Natural Desert Association v. Thomas*) and 309 (asserting *PUD* authorizes 401 certification of federal activities, thus, may authorize 401 certification of non-permitted activities).

For a critical discussion of the possible implications for nonpoint source regulation and activities on federal land after the *PUD* decision, *see Donahue, supra* note 8, at 217-18; Pifher, *supra*, at 19-29; Ransel, *supra*, at 268-83; Miles, *supra* note 4, at 206-09; *see generally* Leonard, *supra*.

Further, the Supreme Court's decision in *PUD* may have rendered the Ninth Circuit's analysis of section 301 in *ONRC* invalid. The plaintiff in *ONRC* did not sue to force activities permitted under NPDES provisions to comply with state water quality standards. *See id.* at 848 (explaining defendant's argument *ONRC* can only sue to enforce water quality standards related to NPDES permit provisions). The *ONRC* court's holding, nonetheless, precluded enforcing additional standards for permitted activities necessary to meet state water quality standards which are unrelated to point sources. *Cf. id.* at 849 (rejecting argument citizen suit provision can be used to enforce water quality standards). The majority's decision in *PUD*, however, interpreted section 301 as permitting additional means outside NPDES conditions for ensuring federally permitted activities comply with other state requirements, such as state water quality standards. *See PUD*, 511 U.S. at 712-13. While not defining what additional means a state is authorized to enforce under section 301(b)(1)(C), the Court did expressly state that section 301 is not limited to discharges. *See id.* at 713, 713 n.3. Assuming, *arguendo*, that the term "discharge" only includes point sources of pollution, the decision in *PUD* leaves open the possibility that nonpoint sources of pollution not meeting state limitations could be subject to state conditions under section 301(b)(1)(C), a possibility the *ONRC* court specifically rejected. The decision in *PUD* thus contradicts the

### 3. *The Ninth Circuit Split: Does the Term "Discharge" in CWA Section 401 Include Nonpoint Sources of Pollution?*

In 1996, two district courts within the Ninth Circuit specifically addressed whether a discharge encompassing a point source was a prerequisite for triggering section 401 review.<sup>43</sup> Both district courts addressed, for the first time, whether nonpoint sources of pollution fall within the statutory definition of discharge.<sup>44</sup> Looking to the plain language of CWA, and CWA's legislative history, the two district courts came to opposite conclusions.<sup>45</sup> The United States Dis-

Ninth Circuit's statutory analysis of section 301 in *ONRC*. For a subsequent Ninth Circuit decision recognizing this impact of the *PUD* court's decision, see *infra* note 189.

43. See generally *Oregon Natural Desert Ass'n v. Thomas (ONDA I)*, 940 F. Supp. 1534 (D. Or. 1996), *rev'd sub nom.* *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998); *Idaho Conservation League v. Caswell*, No. CV 95-394-S-MHW, 1996 WL 938215, at \*1 (D. Idaho Aug. 12, 1996). For an in-depth discussion of the opposing legal arguments addressing whether section 401 applies to nonpoint pollution sources from federally permitted activities, see Miles, *supra* note 4, at 209-228 (reviewing term "discharge's" broad and narrow reading).

44. See *ONDA I*, 940 F. Supp. at 1539 (noting issue is whether grazing is discharge under section 401); *Idaho Conservation*, 1996 WL 938215, at \*7-10 (addressing whether section 401 applies to logging activities). The *Idaho Conservation* court specifically noted that not only had the parties failed to cite any authority for their respective opinions, but further, the court could not find any cases which were directly on point "and thus, this issue appears to be a case of first impression." *Idaho Conservation*, 1996 WL 938215, at \*9. The *ONDA I* court, while not specifically stating they were addressing an issue of first impression, did not cite any authority on point which analyzed the scope of the term "discharge" in section 401. Cf. Donahue, *supra* note 8, at 206 (highlighting lack of attention to section 401 and stating, "Few if any reported cases have examined thoroughly the language of the [Act] or considered systematically its relation to other [CWA] provisions [and] [n]o reported case has expressly considered whether the section 401 certification authority extends to nonpoint source pollution caused by federally permitted activities conducted on the public lands").

45. Compare *ONDA I*, 940 F. Supp. at 1541 (holding section 401 encompasses nonpoint source pollution) with *Idaho Conservation*, 1996 WL 938215, at \*9 (holding section 401 does not regulate nonpoint source pollution).

The language of section 401(a) contemplates regulation of "any discharge." See C.W.A. § 401(a), 33 U.S.C. § 1341(a). For the statutory language of section 401(a), see *supra* notes 28 & 38. Focusing on the word "includes" in CWA's definition of discharge, several commentators assert that discharge and "discharge of a pollutant" are separate terms. See Donahue, *supra* note 8, at 230 (explaining Congress's use of "means" in "discharge of pollutant," versus "includes" in "discharge," denotes different terms); see also Miles, *supra* note 4, at 212-25 (discussing different approaches to interpreting term "discharge"). The only definition in section 502 which uses "includes" is the one for discharge, thus showing Congress intended to include point sources, but not exclude other types of sources of pollution. See Donahue, *supra* note 8, at 230 ("This plainly reveals that Congress intended 'discharge' to be interpreted as including, but not limited to, point source discharges."). In contrast, Congress used the word "means" in the definition of "discharge of a pollutant." See *id.* This denotes Congress's intent for the term discharge to have two separate usages, the broader of which is "discharge." See *id.*; see also Miles, *supra*

note 4, at 212 (highlighting arguments in favor of broad reading); *cf.* In Re Perroton, 958 F.2d 889, 893 (9th Cir. 1992) (“[I]n statutes that contain statutory definition sections it is commonly understood that such definitions establish meaning where the terms appear in that same Act.” (citation omitted)). Indeed, the word “includes” has unexpressed meaning, while the term “means” excludes any other meaning not stated. *See* Meese v. Keene, 481 U.S. 465, 484 (1987) (construing Congressional intent in definition of term “political propaganda,” stating, “It is axiomatic that the statutory definition of the term excludes unstated meanings of that term”); *United States v. Smith*, 155 F.3d 1051, 1057 (9th Cir. 1998) (“When . . . the meaning of a word is clearly explained in a statute, courts are not at liberty to look beyond the statutory definition.”); *Pottgieser v. Kizer*, 906 F.2d 1319, 1322 (9th Cir. 1990) (construing plain meaning of definition term “medical assistance”) (citing as support *Colausti v. Franklin*, 439 U.S. 379, 392 & n.10 (1979) (“A definition which declares what a term ‘means’ . . . excludes any meaning that is not stated.”) *overruled in part on other grounds*)); *see also* *North Carolina v. Federal Energy Regulatory Comm’n*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (noting definition of discharge is inclusive in nature in holding resulting water reduction from dam not discharge of a pollutant), *cert. denied*, 118 S. Ct. 1036 (1998), and *cert. denied by* *Roanoke River Basin Ass’n v. Federal Energy Regulatory Comm’n*, 118 S. Ct. 1037 (1998); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1054 (9th Cir. 1985) (using principle word “includes” in statutory definitions indicates term “is one of enlargement, not of limitation”) (citations omitted), *rev’d on other grounds*, 474 U.S. 9 (1985); *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982) (comparing operation of words “includes” and “means” in statutory definitions, implying word “includes” is non-exclusive); *Exxon Corp. v. Lujan*, 730 F. Supp. 1535, 1545 (D. Wyo. 1990) (“The use of the word ‘includes’ rather than ‘means’ in a definition indicates that what follows is a nonexclusive list which may be enlarged upon.”).

Further, the language “any discharge” in section 401 was retained from the version of FWPCA existing before the CWA Amendments. *See* Donahue, *supra* note 8, at 232 (reviewing CWA’s legislative history and concluding it “shows no intent to require a point source discharge as a predicate for section 401 review”); Miles, *supra* note 4, at 216 (noting regulation prior to 1972 focused on water quality standards). The 1970 Water Quality Act, a precursor to CWA, did not make a distinction between point and nonpoint sources of pollution. *See* Donahue, *supra* note 8, at 232. Thus, the 1972 Amendments to the Water Quality Act (establishing CWA) were not intended to limit section 401’s scope. *See id.* (explaining because section 401’s regulation of “any discharge” “predates the adoption of the ‘point source’ definition in the 1972 [CWA] Amendments, it goes without saying that Congress was not contemplating ‘point source discharges’ when it wrote ‘any discharge’ into the precursor of section 401” (internal citations omitted)). In support of her position, Donahue cited congressional debates on the Amendment of section 401. *See id.* at 224 (“‘All we ask is that activities that threaten to pollute the environment be subjected to the examination of the . . . State . . . before the Federal license or permit be granted.’”) (citations omitted). She states that “the word ‘pollutant’ (as in ‘discharge of a pollutant’) appears *nowhere* in section 401” or in legislative history discussing section 401. *Id.* at 231, 231 n.166. Lastly, policy supports this inclusive reading of the term “discharge” because it would allow states to achieve CWA’s goals. *See* Donahue, *supra* note 8, at 290 (highlighting cost-effectiveness of subjecting nonpoint sources to 401 review); Miles, *supra* note 4, at 221 (discussing policy reasons for state regulation of nonpoint sources). For additional policy considerations supporting this proposition, *see* Donahue, *supra* note 8, at 289-98.

Reviewing the possible interpretations of the term “discharge,” one commentator, Alia Miles, set forth the arguments supporting a “narrower reading of the term “discharge.” *See* Miles, *supra* note 4, at 221-25. Miles points out that Congress’s intention was not necessarily to include all pollutants, including runoff, or

strict Court for the District of Oregon held that the term "discharge" is not limited to point sources of pollution.<sup>46</sup> In contrast, the United States District Court for the District of Idaho held that section 401 of CWA applies only to point source discharges.<sup>47</sup> Resolu-

nonpoint sources in "discharge's" definition, but rather, to include only *discharges from point sources*. See *id.* at 222 (pointing out "one can argue using the word 'discharge' instead of the phrase 'discharge of pollutants' indicates that the provision applies to discharge from a point source, but not of material listed as a pollutant in the CWA"). Looking to all provision of the Act, it appears that Congress did not use the term "runoff" and "discharge" synonymously, thus if Congress had intended section 401 to apply to "runoff" they could have specified so as they did in section 313. See *id.* (citing federal facilities provision which specifically regulates both pollution sources). Further, not only do the provisions usually reference the words "discharge" and "point source" together, but not the word "discharge" with "nonpoint source," but Congress did not choose to change the language of section 401 in 1987 when they mandated a specific focus on nonpoint sources of pollution. See *id.* at 222-23 ("If section 401 was actually intended to apply to federal permits for both point and nonpoint source activities, it seems likely that Congress would have amended the provision to insure proper implementation.").

Lastly, the creation of a dual regulatory scheme supports the exclusion of nonpoint sources from the ambit of section 401. See *id.* at 223-25 (elaborating on possible "implementation problems" were section 401 applied to "any nonpoint source activities which may result in a discharge"). However, Miles concludes that "[o]n balance, the logic of the arguments for a broad reading are more persuasive and true to the canons of statutory interpretation." *Id.* at 225 (reviewing arguments for broad reading of term "discharge"). The fact that the discharge definition uses the word "includes," and the phrase "any discharge" in section 401 preceded CWA's 1972 Amendments, thus should be ascribed its plain meaning, supports requiring section 401 certification which indicates a federally permitted nonpoint source activity which may result in a discharge will not violate state water quality standards. See *id.* Nonpoint sources are not specifically excluded from regulation by CWA sections other than sections 208 and 319, including section 401, and nothing in CWA's scheme precludes a provision from regulating both sources of pollution. See *id.* at 225-26.

For a discussion of the Ninth Circuit's recognition provisions may regulate both pollution sources, see *supra* note 69. For case law addressing the distinction in use between the word "includes" and "means" within a statutory definition, see *supra* note 38 (discussing *ONRC*); *infra* notes 46-47 and accompanying text (discussing *ONDA I* and *Idaho Conservation*); *infra* notes 50 (discussing *National Wildlife*) & 56-58 (discussing *United States v. Plaza Health Laboratories, Inc.*) & 60 (discussing *NDRC*) & 62 (discussing *North Carolina v. Federal Energy Regulatory Commission*); *infra* notes 112-15 and accompanying text (discussing *ONDA II*).

46. See *ONDA I*, 940 F. Supp. at 1534 (determining "CWA's reference to any 'discharge' into navigable waters was not limited to point sources, and . . . pollution of creek and river caused by cattle grazing constituted 'discharge' for which state certification was required"). For the text of the *ONDA II* court's holding, see *infra* notes 96-97. For a detailed discussion of the *ONDA I* court's holding and rationale, see *infra* notes 99-106 and accompanying text.

47. See *Idaho Conservation*, 1996 WL 938215, at \*9 ("[I]t is evident that Section 401 only intended to encompass those projects which resulted in a 'point source discharge.'"); see also *Oregon Natural Desert Association v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998) (overturning *ONDA I*), *rev'g Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996). In *Idaho Conservation*, the United States Forest Service (USFS) approved a private company's proposal to build two roads through land located in the Clear-



tion of this issue was left to the Ninth Circuit in *ONDA II*, the subject of this Note.

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water National Forest so the company could access its private land. See *Idaho Conservation*, 1996 WL 938215, at \*1. These roads would allow access to land the company, Plum Creek, intended to log. See *id.* The access roads would be located near both banks of Walton Creek. See *id.* An environmental group, Idaho Conservation League (ICL), sought declaratory and injunctive relief against USFS, its management, and Plum Creek. See *id.* at \*1. ICL alleged that the proposed activities would violate CWA because the activities would violate state water quality standards and impair the use of Walton Creek. See *id.* at \*2. Specifically, ICL alleged that USFS violated CWA by failing to obtain state certification under section 401 before approving the proposal. See *id.* at \*8. USFS argued that section 401 does not apply to construction of a forest logging road because logging activities are not point sources of pollution. See *id.* at \*7-8.

The district court held that logging activities are nonpoint pollution sources, and that section 401 did not apply to any nonpoint sources, including Plum Creek's proposed activities. See *id.* at \*9. The *Idaho Conservation* court recognized that section 401(a) was adopted in 1970 prior to the enactment of the current version of CWA. See *id.* at \*8 (explaining section 401(a) originated as section 21(b) of Water Quality Improvement Act (WQIA)). Although CWA retains WQIA's prohibition against "any discharge," by "any applicant," for a federal license, the term "discharge" was not defined by WQIA. See *id.* Looking to the plain language of CWA, the *Idaho Conservation* court noted that the definition of discharge included "discharge of a pollutant." See *id.* The district court, focusing exclusively on the language of "discharge of a pollutant," which specifically requires that the pollution emanate from a point source, concluded, "Thus, it is evident that Section 401 only intended to encompass those projects which resulted in a 'point source discharge.'" *Id.* at \*9.

The district court looked to the legislative history and Amendments in support of its decision. The *Idaho Conservation* court noted that two regulatory schemes were established, one addressing point source pollution, and the other nonpoint pollution. See *id.* at \*9 (citing C.W.A. § 208, 33 U.S.C. § 1288 (describing areawide waste treatment management), C.W.A. § 319, 33 U.S.C. § 1329 (managing nonpoint sources)). The *Idaho Conservation* court construed this regulatory scheme to mean Congress intended for construction of forest roads to be nonpoint sources of pollution, "and therefore [ ] not subject to the certification requirement of Section 401." *Id.* The district court found further support for its position based on CWA section 319 being added pursuant to CWA's 1987 Amendments, which specifically addressed nonpoint source pollution. See *id.* (citing C.W.A. § 319, 33 U.S.C. § 1329).

Lastly, the *Idaho Conservation* court distinguished the Supreme Court's ruling in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*. See *id.* at \*10. In *PUD*, the parties not only agreed that the hydroelectric power plant project required section 401 certification, but "it was undisputed that the project would result in the discharge of pollutants . . . . Thus, [*PUD*] does not stand for the proposition that all nonpoint sources are subject to Section 401 certification." *Id.* The district court appears to have found an implied assertion in *PUD* that the Court proceeded in its analysis *because* there were discharges, thus not necessitating the discussion of whether the activities were in fact discharges. *Cf. id.* (presuming discharge of water at end of tailrace in *PUD* was discharge of pollutant).

## B. Statutory Language

### 1. Discharge Defined

CWA defines the term "discharge" in two ways: (1) as it stands alone and (2) in conjunction with a particular emission.<sup>48</sup> The Act states, "'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants."<sup>49</sup> Discharge of a pollutant or pollutants "*means* (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."<sup>50</sup>

48. Compare C.W.A. § 502(16), 33 U.S.C. § 1362(16) (defining term "discharge") with C.W.A. § 502(12), 33 U.S.C. § 1362(12) (defining term "discharge of a pollutant").

49. C.W.A. § 502(16), 33 U.S.C. § 1362(16) (emphasis added). For case law addressing judicial interpretation of the terms "discharge" and "discharge of a pollutant," see *infra* notes 43-47 & 59-63 & 99-143 and accompanying text. For a discussion of "includes" operation in a statutory definition, see *supra* notes 45 & 50 & 60.

50. C.W.A. § 502(12), 33 U.S.C. § 1362(12) (emphasis added). The Act also defines key terms within this definition. Navigable waters means "the waters of the United States, including territorial seas." Pollutant "means dredged soil, solid waste . . . biological materials . . . and agricultural waste discharged into water." C.W.A. § 502(6), 33 U.S.C. § 1362(6). Agricultural pollution includes "sedimentation; animal wastes; fertilizers; pesticides, fungicides and herbicides; forest and crop residues; agricultural processing wastes; and inorganic salts and minerals." S. REP. NO. 92-414, at 3668 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3759. A discharge "*includes* a discharge of a pollutant, and a discharge of pollutants: unless otherwise qualified in meaning." C.W.A. § 502(16), 33 U.S.C. § 1362(16) (emphasis added). For an in-depth analysis in construing the terms "navigable waters" and "pollutant," see generally *Rybacek v. EPA*, 904 F.2d 1276 (9th Cir. 1990); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (1982).

The D.C. Circuit had occasion to interpret the term "discharge of a pollutant" in *National Wildlife Federation v. Gorsuch*. See *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 161 (1982). The issue before the D.C. Circuit was whether dam induced water quality changes were in fact "discharges of a pollutant." *Id.* In this case, Wildlife Federation and the state of Missouri (collectively WF) requested a declaration that EPA must regulate dams under CWA section 402(a). See *id.* at 161. EPA and various electric utilities and water agencies (collectively EPA) appealed the district court decision ordering EPA to require dam operators to obtain NPDES permits. See *id.* EPA argued that dams were not required to be regulated under NPDES. See *id.* The crux of the issue was the scope of the term "discharge of a pollutant" in section 402(a). See *id.* EPA argued for a narrow reading of the term in this case. See *id.*

First, the D.C. Circuit clarified the language of CWA they must interpret. See *id.* at 164-65. Quoting section 402(a), they observed that this section gives EPA discretion to issue a permit for the discharge of any pollutant. See *id.* Further, they noted that pursuant to section 301(a), the discharge of a pollutant is illegal without an NPDES permit. See *id.* (quoting C.W.A. § 301(a), 33 U.S.C. § 1311(a)). The *National Wildlife* court referenced the statutory definition of the term "discharge of a pollutant" and concluded, "Thus, for dams to require NPDES permits, five elements must be present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *Id.* The parties conceded that the dam could be

a point source, and that the discharge would occur in navigable waters. *See id.* The elements in dispute narrowed the issue to whether *pollutants*, low dissolved oxygen, cold, and supersaturation, had been *added*, from the dam. *See id.* The *National Wildlife* court did not address whether the "discharge of a pollutant" would emanate from a point source. *Cf. id.* (declining to focus analysis on terms "point source" or "navigable waters").

Second, the D.C. Circuit reviewed the arguments before them. *See id.* WF argued that a pollutant results when there is any change in water quality, and that the release of these changed waters, which go from the reservoir through a pipe into a downstream river, constitutes an addition of a pollutant from a point source. *See id.* EPA did concede that water quality changes from dams are pollution, but argued that low dissolved oxygen, cold, and supersaturation are not "pollutants" as defined by the Act. *See id.* (referencing CWA's definition of "pollutant"). Further, an "addition" requires the pollutant to come "from the outside world," not pass through a dam from one waterbody to another as in this case. *Id.* The *National Wildlife* court concluded that the water quality changes in question, "[l]ow dissolved oxygen, cold, and supersaturation, do not fall within the statutory lists of pollutants . . . [and are] water *conditions* not substances added to water," further noting heat is the only water condition specified in "discharge of a pollutant's" definition. *Id.* at 171.

In reaching this conclusion, the D.C. Circuit determined as a threshold issue how much deference was due EPA's interpretation because the language of the Act and legislative history could support either argument before them, and concluded that, in this case, EPA's interpretation "deserve[d] great deference." *See id.* at 166-70. The *National Wildlife* court based their conclusion in part on Congress's express intent that EPA have "at least some power to define the specific terms 'point source' and 'pollutant.'" *Id.* at 167. In so holding, the D.C. Circuit rejected WF's argument EPA's narrow interpretation of the terms "pollutant" and "addition" in this case was contrary to their interpretation of these same terms in other contexts. *See id.* at 168 ("We, however, find no inconsistency in EPA's taking a broad view of its statutory mandate in some situations and a narrower view here, even though the same statutory terms are involved.").

Lastly, the D.C. Circuit analyzed whether EPA's interpretation of the statute was reasonable. *See id.* at 170-83. The *National Wildlife* court set forth the statutory construction they would follow to resolve this issue: (1) an analysis of the plain language of the statute; and (2) analysis of legislative history. *See id.* at 171. The *National Wildlife* court specifically noted that the Supreme Court mandates that interpretation of CWA must include reference to the legislative history to determine the purpose and policy of the Act. *See id.* (citations omitted).

Turning first to whether low dissolved oxygen, cold, and supersaturation fall within the definition of "pollutant," the *National Wildlife* court focused on how the term "means" within a statutory definition operates. *See id.* at 171-72. The *National Wildlife* court observed that CWA provides a statutory definition for both the terms "pollution" and "pollutant." *See id.* (discussing distinction between these two terms). The D.C. Circuit noted that while the term "pollutant," prior to 1972, had used the word "means," its definition was not exclusive because the phrase "but is not limited to" followed the word "means." *Cf. id.* at 173 (concluding ambiguity in definitional language required analysis of legislative history to resolve issue). In a footnote, the *National Wildlife* court gave the terms "point source," "oil," and "discharge" from CWA section 311, as terms which use the "looser phrase" includes. *Cf. id.* at 172 n.49 (providing examples of terms using language "means . . . but not limited to") (quoting C.W.A. § 502(14), 33 U.S.C. § 1362(14) (defining point source); C.W.A. § 311(a)(1), 33 U.S.C. § 1321(a)(1) (defining term "oil"); C.W.A. § 311(a)(2), 33 U.S.C. § 1321(a)(2) (defining term "discharge"))). The words "but is not limited to," however, was removed from the definition of the term "pollutant" in 1972. *See id.* at 173 (stating change to definition supported not equating terms "pollutant" and "pollution"). The *National Wildlife* court, stated that, "[a]s a

general rule, "[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Id.* at 172 (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 n. 10 (quoting C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.07 (4th ed. Supp. 1982))). WF argued that, logically, the water changes must be pollutants if they meet the statutory definition of "pollution" under CWA. *See id.* The *National Wildlife* court, however, rejected this argument, stating that the pollution in question not only was not specifically listed in the 1972 definition of "pollutant," but that the most recent "wording of [section] 506(6) [made them] cautious in adding new terms to the definition [because] Congress used restrictive phrasing-'[t]he term "pollutant" means dredged spoil, [etc.]'-rather than the looser phrase 'includes,' used elsewhere in the Act." *Id.*

Thus, the D.C. Circuit determined that the plain language did not clearly support WF's proposition and, thus, turned to the legislative history to aid in determining the definitional term's scope. *Cf. id.* at 172, 172 n.50 (distinguishing Tenth Circuit's decision in *Earth Sciences*). They concluded that the legislative history supported their holding that EPA's interpretation was reasonable. *See id.* at 172. The D.C. Circuit reasoned that Congress's separate use of these two terms must be presumed to be intentional, particularly when the terms were given their own discrete definitions. *See id.* (citations omitted). Further, the *National Wildlife* court noted that Congress did not specifically require permits for dam induced pollution, as it did for industrial waste, and did not evidence any intent to equate the broader term "pollution" with the narrower term "pollutant." *See id.* at 172-73. Indeed, the *National Wildlife* court noted that Congress would have no need of a definition section if this were the case. *See id.* at 173 (explaining although Congress did not elaborate on how inclusive "pollutant" should be, definitional language, particularly section 502, has "specific and technical meaning" which must be carefully considered). The D.C. Circuit observed that the language of the Act and the legislative history were not "entirely consistent." *See id.* Thus, Congress did not clearly intend to consider pollution from dams as pollutants for purposes of the Act, and as EPA's interpretation was reasonable, the D.C. Circuit concluded that it must defer to EPA's determination of what constitutes a pollutant. *See id.* at 173. The court found support for this deference in the reasonableness of EPA's interpretation and Congress's intent that EPA be given power to interpret definitions under CWA, including the term "pollutant." *See id.* at 174.

Next, the *National Wildlife* court examined what an "addition" of a pollutant "from," constituting a "discharge of a pollutant," is. *See id.* The term "addition" is not defined by the Act. *See id.* WF argued that the redepositing of water through the pipes from the dam constitute an addition from a point source. *See id.* In contrast, EPA asserted that an addition only occurs the first time a pollutant enters the water, not when it is simply moved from one body of water to another. *See id.* at 174-75. The *National Wildlife* court further noted that EPA would regulate a point source which does not come "from" a point source, but "merely passes through it from land to navigable water." *Id.* at 175 n.58. They observed that this position was inconsistent with EPA's existing regulation. *See id.* (citing EPA regulation 40 C.F.R. section 122.3(1981) which regulates surface runoff collected and channeled by as a point source). The D.C. Circuit concluded, however, that while "the language of the statute permits either construction," because Congress gave EPA authority to define two terms that are integral to section 402, point source and pollutant, that "it [is] likely that Congress would have given EPA similar discretion to define 'addition' had it expected the meaning of the term to be disputed." *Id.* at 175. Thus, the court deferred to EPA's interpretation which they found to be reasonable. *See id.*

The *National Wildlife* court also addressed WF's argument that a broad reading of the term "addition" and "pollutant," placing dams under NPDES regulation, was appropriate due to Congress's view that this program was its preferred water pollution control method. *See id.* However, the D.C. Circuit rejected this broader reading, stating "it does not appear that Congress wanted to apply the NPDES system

Under this definition, a pollutant from surface runoff will be considered discharged if it is "collected or channeled by man."<sup>51</sup> The discharge of a pollutant without a permit that certifies the discharge is in compliance with water quality regulations violates CWA.<sup>52</sup>

## 2. Point and Nonpoint Sources Defined

### a. CWA

The Act categorizes pollution into either nonpoint or point sources.<sup>53</sup> The Act defines a point source as:

*[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.*

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wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, e.g., 'all pollution [as opposed to the narrower term "pollutant"] released through a point source.' Instead, as we have seen, the NPDES system was limited to 'addition' of 'pollutants' 'from' a point source." *Id.* at 176. Reviewing the 1970, 1977 and 1987 Amendments' legislative history, the D.C. Circuit acknowledged that nonpoint and point sources of pollution are regulated separately under the Act, preferring to leave regulation of nonpoint sources to the states through state pollution control programs. *See id.* at 175-77. The *National Wildlife* court nonetheless asserted that Congress also intended to leave certain pollution problems to the states "to give the states a chance to show that they could do the job." *Id.* at 176. Thus, the *National Wildlife* court held that EPA's choice not to regulate dam pollution under the NPDES permit program was a reasonable one. *See id.* at 176-83 (determining EPA's interpretation also did not contravene CWA's purpose and Congress's policy considerations in enacting CWA).

51. *See* 40 C.F.R. § 122.2. EPA is responsible for setting the guidelines for issuance of NPDES permits and has elaborated on the permissible characteristics of what constitutes a discharge. *See* C.W.A. § 402(a)(1), 33 U.S.C. § 1342(a)(1). Thus, EPA's "definition includes *additions* of pollutants into waters of the United States from: surface runoff which is *collected or channeled by man*." 40 C.F.R. § 122.2. (emphasis added). For judicial decisions interpreting the meaning of the phrase "collected or channeled by man," *see infra* notes 72-76 and accompanying text.

52. *See* C.W.A. § 402(a)(1), 33 U.S.C. § 1341(a)(1). For the relevant statutory language of section 401(a)(1), *see supra* notes 28 & 38.

53. *See Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849, 849 n.12 (9th Cir. 1987) (noting distinction in regulation of two pollution sources); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982) ("In 1972, Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was *specifically reserved* to State and local governments through the Section 208 process."); *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 630 n.11 (D.R.I. 1990) (noting Congress distinguished between nonpoint and point sources of pollution in 1972 CWA Amendments (quoting *ONRC*, 834 F.2d at 849)).

This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.<sup>54</sup>

CWA does not provide a specific definition of nonpoint source, although the term is mentioned in its provisions.<sup>55</sup>

### b. Legislative history

The legislative history of CWA suggests that a nonpoint source is "one that does not confine its polluting discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch, or a conduit."<sup>56</sup> Specifically, Congress noted that "agricultural runoff" falls within the purview of this definition.<sup>57</sup> In addition, other authori-

54. C.W.A. § 502(14), 33 U.S.C. § 1362(14) (emphasis added).

55. See, e.g., C.W.A. § 208(b)(2)(f), 33 U.S.C. § 1288(b)(2)(f) (stating requirement for creating areawide waste treatment management plans include "a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including . . . runoff from manure disposal areas, and from land used for livestock and crop production"); CWA § 402(l)(2), 33 U.S.C. § 1342(l)(2) (exempting several types of stormwater runoff from NPDES permit requirements); CWA § 313 (a)(2), 33 U.S.C. § 1323(a)(2) (requiring federal entities "engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants" to comply with state water quality standards); see also Frank, *supra* note 6, at 1287 & n.149 (noting, although "nonpoint sources are referred to in sections [of CWA] . . . [a]pparently, Congress felt that the character of nonpoint sources was sufficiently vague and amorphous as to render any attempt to define the term futile"); Zaring, *supra* note 8, at 516 (stating CWA does not define nonpoint pollution sources "though phrase often appears in its text"). For example, in discussing the allotments of funds to states regulating nonpoint source pollution, section 319 requires the Federal Government to consider giving grants to states "which have implemented or are proposing to implement management programs which will - (A) control particularly difficult or serious nonpoint source pollution problems, including, but not limited to, problems resulting from mining activities." C.W.A. § 319(h)(5)-(h)(5)(A), 33 U.S.C. §§ 1329(h)(5)-1329(h)(5)(A).

56. See S. REP. NO. 92-414, at 3668 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3760 (explaining that pollution flowing from agricultural endeavors is from nonpoint sources); see also Beartooth Alliance v. Crown Butte Mines, 904 F.Supp. 1168, 1173 (D. Mont. 1995) (defining nonpoint source pollution as "uncollected runoff water which is difficult to ascribe to single polluter" (citing Trustees for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir. 1984)); cf. Environmental Protection Agency, *Pollution Prevention Strategy*, 56 Fed. Reg. 7854 (1991) (noting nonpoint source pollution "is characterized by the widespread nature of its sources"). For EPA's characterization of nonpoint sources, and nonpoint source pollution, see *supra* note 6 & 8.

57. S. REP. NO. 92-414, at 3668 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3766. This Amendment emphasized the need for states to develop procedures under areawide waste treatment management programs to control "agricultural runoff, surface and underground mine runoff, construction runoff, and disposal of pollutants on land or in excavations." See *id.* at 3676 (recognizing difficulty in controlling pollution from nonpoint sources "such as agricultural runoff" and need for more effective ways of regulating such pollution). "Agricultural runoff" falls within the definition of nonpoint sources. See *id.* at 3676. Senator Bob Dole noted that the Act set out to address the pollution from agriculture problems in

ties have asserted that activities such as livestock grazing fall within the definition of nonpoint sources.<sup>58</sup>

### C. Case law

#### 1. What Comprises a Discharge?

CWA's definition of the term "discharge" includes a "discharge of a pollutant."<sup>59</sup> In applying and interpreting the definition of the term "discharge" under section 401, many courts focus exclusively on the requirements set forth in the definition of the term "discharge of a pollutant."<sup>60</sup> Thus, discharge for purposes of this sec-

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particular, the pollution which primarily comes from nonpoint sources. *See id.* at 3759-60. Senator Dole stated, "a major new thrust of this bill is in the field of agricultural pollution. Most of the problems of agricultural pollution deal with nonpoint sources." *Id.*; *see also* Environmental Protection Agency, *Pollution Prevention Strategy*, 56 Fed. Reg. 7854 (1991) ("Agricultural pollution, like other types of nonpoint sources pollution, is characterized by the widespread nature of its sources."). For the Ninth Circuit's characterization of nonpoint sources and nonpoint source pollution, *see infra* notes 68-73 and accompanying text. For judicial decisions distinguishing between point and nonpoint sources, *see infra* notes 64-85 and accompanying text.

58. *See, e.g.*, Frank, *supra* note 6, at 1270 ("Riparian areas scourged by 'nonpoint pollution sources,' in this case livestock grazing, merit federal statutory protection.") (citation omitted).

59. *See* C.W.A. § 502(16), 33 U.S.C. § 1362(16). For the text of section 502's discharge definition, *see supra* note 49 and accompanying text.

60. *See, e.g.*, Committee to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993) (establishing liability under CWA includes element of "discharging a pollutant"), *cert. denied sub nom.* Members of Cal. Reg'l Water Quality Control Bd. v. Committee to Save Mokelumne River, 513 U.S. 873 (1994); Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1316 (9th Cir. 1990) (concluding term "discharge" only references point sources); Rybachek v. EPA, 904 F.2d 1276, 1285 (9th Cir. 1990) (defining discharge as "any 'addition[ ] to navigable waters from any point source'"); Oregon Natural Resources Council v. United States Forest Serv., 834 F.2d 842, 848-50 (9th Cir. 1987) (construing CWA section 301); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 171 (D.C. Cir. 1982) (analyzing scope of terms "pollutant" and "addition" in "discharge of a pollutant" definition); Idaho Conservation League v. Caswell, No. CV 95-394-S-MHW, 1996 WL 938215, at \*9-10 (D. Idaho Aug. 12, 1996) focusing on term "discharge of pollutant" in holding discharges only emanate from point sources); *see also* North Carolina v. Federal Energy Regulatory Comm'n, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (declining to interpret CWA section 502 as offering specific definition of discharge). *But see generally* Oregon Natural Desert Ass'n v. Thomas, 940 F. Supp. 1534 (D. Or. 1996) (focusing on definition of term "discharge" in holding discharges emanate from both point and nonpoint sources of pollution), *rev'd sub nom.* Oregon Natural Desert Ass'n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998).

For example, in *Natural Resources Defense Council v. EPA (NRDC)*, the Ninth Circuit concluded that CWA's establishment of NPDES, limiting discharges, applied to point source discharges only, because discharges are defined by CWA as "discharges of pollutants." 915 F.2d at 1316. The *NRDC* court supported its conclusion by reference to the language of the Act. Section 301(a) of CWA, while appearing to ban all discharges wholesale, in reality "sounded bolder than it really

tion requires five elements: “(1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*.”<sup>61</sup> Judicial interpretation of these elements often vary. For example, some courts interpret discharge as requiring the addition of something *external* to the water, while others allow merely an *alteration* of the water.<sup>62</sup> Re-

was.” *Id.* at 1316; *see also* C.W.A. § 301(a), 33 U.S.C. § 301(a) (“Except in compliance with this section and [other provisions] of this title, the discharge of any pollutant by any person shall be unlawful.”). The Ninth Circuit reasoned that the definition of “discharge of any pollutant” in section 301(a) excluded nonpoint sources by reference to section 502(12), defining “discharge of a pollutant.” *See NRDC*, 915 F.2d at 1316. The circuit court stated, “[t]he term ‘discharge of any pollutant’ was a statutorily defined term meaning, ‘any addition of any pollutant to navigable waters from any point source.’” *Id.* (quoting C.W.A. § 502(12), 33 U.S.C. § 1362(12)). The *NRDC* court further justified its rationale by noting that nonpoint sources were addressed by another provision of the Act which did not limit emissions but offered incentives to polluters to reduce nonpoint source pollution. *See id.* at 1316 n.3. (citing C.W.A. § 208, 33 U.S.C. § 1288).

Indeed, section 502 is a guideline as to what could constitute a discharge. *See North Carolina*, 112 F.3d at 1187 (“That section does not provide an express definition of the term ‘discharge’ but rather provides a statement of inclusion . . .”). In *North Carolina v. Federal Energy Regulatory Commission*, the D.C. Circuit concluded that the definition of discharge required the addition of a pollutant and held that withdrawal of water from a lake is not a discharge under section 401 of CWA. *See id.* at 1187-88 (“Obviously, the withdrawal of water . . . will add nothing. . .”). The *North Carolina* court reasoned that discharge was defined by reference to the action of “discharging of a pollutant.” *See id.* at 1187. Turning to the definition of “discharge of a pollutant,” the D.C. Circuit further concluded that the wording “any addition of a pollutant” is a threshold requirement to meet the meaning of discharge contemplated by Congress. *See id.* at 1187, 1187-88 n.4. In conclusion, the D.C. Circuit stated that “if ‘discharge of a pollutant’ requires addition, then the inclusive understanding of ‘discharge’ also requires an addition.” *Id.* at 1187-88 n.4.

61. *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *cf.* *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 645 (2d Cir. 1992) (construing definition to show four elements: “added,” “pollutant,” “to navigable waters,” “from any point source”), *cert. denied by United States v. Villegas*, 512 U.S. 1245 (1994). The number of elements to be analyzed under the term “discharge” may vary even within the same circuit. For example, within the Ninth Circuit, the Ninth Circuit Court of Appeals has found five elements while the District Court of Montana has divided discharge into four elements. *Compare Committee to Save Mokelumne River*, 13 F.3d at 308 (establishing violation requires proof “that defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source.”) (citing *National Wildlife*, 693 F.2d at 165) *with Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1172-73 (D. Mont. 1995) (dividing discharge into four elements: added, pollutant, to navigable waters, from a point source).

62. *Compare* PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700, 725 (1994) (Thomas, J., dissenting) (disagreeing reduction in stream flow constitutes discharge) *and National Wildlife*, 693 F.2d at 175 (deferring to EPA’s assertion “discharge” requires addition of substances) *and North Carolina*, 112 F.3d at 1187 n. 4 (focusing on exact wording of statute in construing definition of discharge to require addition) *and Save Our Community v. EPA*, 971 F.2d 1155, 1167 (5th Cir. 1992) (holding draining of wetlands not “per se” discharge of effluent) *with PUD*, 511 U.S. at 725 (focusing on pollutant emanating from tailpipe not whether pollutant was external) *and Rybachek v. EPA*, 904 F.2d 1276, 1285



(9th Cir. 1990) (holding pollution from placer mines and redepositing of pollutants are additions to water) and *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (holding redeposit of sediment was addition of pollutant); and *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (holding pollution from placer mines was from point source) and *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (concluding term "redeposit" was encompassed by "addition" in "discharge" definition).

For example, in *Save Our Community v. United States Environmental Protection Agency (SOC)*, the Fifth Circuit held that the withdrawing of water from a pond did not meet the definition of discharge under CWA. 971 F.2d 1155, 1165 (5th Cir. 1992). In *SOC*, a private company, Trinity Valley Reclamation, Inc. (Trinity), proposed to drain several ponds in order to expand a landfill, using a mechanical pump. See *id.* at 1158. The Army Corps of Engineers (Corps), EPA, and the Fish and Wildlife Service determined that Trinity did not need a permit because the draining of water would not "discharge a pollutant." See *id.* at 1158 n.6. Appellants, collectively SOC, sued Trinity seeking a preliminary injunction and a declaratory judgment "that Trinity violated [CWA] by failing to obtain a permit pursuant to section 404 of the Act before starting to drain the ponds." *Id.* at 1157 (internal citation omitted). SOC claimed that draining the ponds would cause a "discharge of a pollutant," thus, the appellees violated CWA by failing to obtain a permit. See *id.* Section 404 requires a permit for activities that discharge dredge and fill material. See C.W.A. § 404(a), 33 U.S.C. § 1344(a). The appellants further asserted that the Corps and EPA erred in failing to require a permit because draining ponds is an activity regulated by CWA. See *SOC*, 971 F.2d at 1157.

The district court held that the draining activity required a permit as a matter of law and issued a permanent injunction. See *id.* The district court declined to address whether a discharge had occurred, and justified its decision by focusing on the purpose of the statute. See *id.* at 1159. The district court reasoned that the activity could not be allowed because draining the pond would destroy the wetlands by eliminating the water, soil and surrounding vegetation. See *id.* at 1158 n.5. Thus, allowing the activity would "be a direct subterfuge of section 404." *Id.* at 1159.

The Fifth Circuit reversed, holding that a discharge required a discharge, i.e. an addition, to a navigable water. See *id.* at 1163. The SOC court rejected the district court opinion and remanded the case because the district court failed to address whether an unpermitted discharge had occurred. See *id.* at 1167-68. The Fifth Circuit found support for its position in the Act's language, stating that it was clear that "[t]he existence [sic] of a discharge is critical." *Id.* at 1163.

The Fifth Circuit addressed whether the removal of water was a discharge requiring a permit. See *id.* at 1165. Noting that the specific issue of whether draining water from wetlands constitutes a discharge had never been decided by the court, the SOC court concluded that draining activity was not "per se" a discharge of a pollutant. See *id.* at 1165, 1167. Recognizing that precedent established that the redepositing of polluted waters could constitute a discharge, the Fifth Circuit remanded to determine whether the activity would redeposit the materials drained from the wetlands, and thus require a permit. See *id.* at 1168.

The District of Columbia Circuit addressed whether the withdrawal of water constituted a "discharge of a pollutant" in *North Carolina v. Federal Energy Regulatory Commission*, 112 F.3d 1175, 1187 (D.C. Cir. 1997). In *North Carolina*, the Corps issued the City of Virginia Beach, Virginia a permit to build a pipeline and dam. See *id.* at 1175. Construction of the pipeline and dam would result in the discharge of a pollutant, sediment. See *id.* at 1181. Upon completion, the pipeline would withdraw 60 million gallons of water a day from Lake Gaston in order to supply the city with daily water, and generate electricity. See *id.* at 1180. Lake Gaston is located in two states, Virginia and North Carolina. See *id.* While the reduction of water flow would affect the water in both states, the sediment from construction would only occur in Virginia. See *id.* The water utilized for generation of electricity would,

ardless, the term "discharge" does not traditionally include nonpoint sources of pollution.<sup>63</sup> Thus, the most controversial of the elements is what constitutes a point source for purposes of determining a discharge under section 401.

## 2. *Distinguishing Between Point and Nonpoint Sources of Pollution*

While CWA gives a list of those sources considered point sources, it is not exhaustive.<sup>64</sup> Courts, therefore, often set the pa-

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however, be redeposited into waters within North Carolina's boundaries. *See id.* at 1181.

The Corps required Virginia Beach to obtain a state water quality certification from the state of Virginia pursuant to section 401 of CWA for the discharge of sediment, and then issued a section 404 permit. *See id.* Virginia Electric Power Company (VEPCO) subsequently requested the dredge and fill permit be amended to allow the withdrawal of water. *See id.* The Federal Energy Regulatory Commission (Commission) overseeing the power project, determined that a state water quality certification was not required from the state of North Carolina because no discharge resulted from the redepositing of water. *See id.* at 1175, 1182. North Carolina petitioned the Commission for review, arguing that a discharge occurred from the dam turbines when electrical generation deposited water in North Carolina. *See id.* at 1175, 1186. The Commission rejected the claim. *See id.* at 1182.

On appeal, the District of Columbia Circuit held that the project would only result in a discharge of sediment from construction in the state of Virginia. *See id.* at 1187. Addressing the operation of the dam upon completion, the *North Carolina* court concluded that "neither the withdrawal of water . . . nor the reduction in the volume of water passing through the dam turbines 'results in a discharge' for purposes of Section 401(a)(1)." *Id.* at 1187. Looking to the Act's plain language, the District of Columbia Circuit noted that section 401(a)(1) does not expressly define discharge "but rather provides a statement of inclusion, . . . [particularly] 'discharge of a pollutant' which requires 'any addition of any pollutant.'" *Id.* at 1187 (quoting C.W.A. §§ 502 (12), (16), 33 U.S.C. §§ 1362(12), (16)). The *North Carolina* court reasoned that the withdrawal of the water and subsequent release from the dam turbines would not add anything to Lake Gaston and, further, concluded, "the existence of certification rights under Section 401(a)(1) does not depend on whether a discharge is 'altered.'" *Id.* at 1188. The court in *North Carolina* distinguished *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, noting the Supreme Court did not address the definition of discharge or indicate that an alteration of water from a dam was a discharge requiring certification under section 401(a)(1). *See id.* at 1188.

63. *See, e.g., Idaho Conservation League v. Caswell*, No. CV 95-394-S-MHW, 1996 WL 938215, at \*9 (D. Idaho Aug. 12, 1996) (holding section 401 does not address nonpoint sources). *But see Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534, 1541 (D. Or. 1996) (holding term "discharge" encompasses nonpoint sources), *rev'd sub nom. Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998). For a discussion of the facts and court analysis in *Idaho Conservation*, see *supra* note 47 and accompanying text. For a discussion of the facts and court rationale in *ONDA I*, see *infra* notes 99-106 and accompanying text.

64. *See C.W.A. § 502(14)*, 33 U.S.C. § 1362(14). This list includes "pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." *Id.* For the

rameters of what constitutes a “discernable, confined and discrete conveyance.”<sup>65</sup> The traditional view of point source encompasses pollutants discharging from industrial equipment, which are easily identifiable,<sup>66</sup> such as “a pipe spewing wastes into a body of water.”<sup>67</sup> In contrast, nonpoint source pollution is water pollution which is *not* from a discrete conveyance.<sup>68</sup> Thus, when courts determine that pollution does not emanate from a point source, they conclude by default that the pollution emanates from a nonpoint source.<sup>69</sup>

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statutory definition of the term “point source,” see *supra* note 54 and accompanying text.

65. *Id.*

66. See, e.g., *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) (addressing examples in point source definition, stating, “Although by its terms the definition of ‘point source’ is nonexclusive, the words used to define the term and the examples given . . . evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways”), *cert. denied by* *United States v. Villegas*, 512 U.S. 1245 (1994); see also *id.* at 651 (Oakes, J., dissenting) (stating, “the classic point source is something like a pipe”).

67. Frank, *supra* note 6, at 1287.

68. See, e.g., *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1424 n.8 (9th Cir. 1989) (describing nonpoint sources other than agricultural and silvicultural activities).

69. See RODGERS, *supra* note 10, at 303 (1993) (discussing 1972 CWA Amendments, stating, “Conceivably, sources satisfying this end-of-pipe vision were point sources; everything else was a nonpoint source”); Gould, *supra* note 8, at 472 (stating CWA “does not define ‘nonpoint source,’ but theoretically this would include any water pollution not caused by a point source”); cf., e.g., *Lyng*, 882 F.2d at 1424, 1424 n.8 (defining nonpoint source pollution as water pollution which is not from discrete conveyances, such as “runoff from fields, forests, mining and construction activities”); *Oregon Natural Resources Defense Council v. United States Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987) (noting nonpoint source pollution is not specifically defined by CWA “but is pollution that does not result from the ‘discharge’ or ‘addition’ of pollutants from a point source”). Nonpoint source pollution is diffuse, not “result[ing] from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.” Gould, *supra* note 8, at 472 (quoting Office of Water, EPA, *Nonpoint Source Guidance* 3 (1987)); see also Conway, *supra* note 8, at 87 (defining nonpoint source pollution as pollution which “occurs when water runs over land or through the ground, picks up pollutants, and deposits them in surface waters or groundwater (citing EPA, *Final Report on the Federal/State/Local Nonpoint Source Task Force and Recommended National Nonpoint Source Policy* 2 (1985))). For EPA’s definition of nonpoint source, see *supra* note 6 and accompanying text.

For example, the Ninth Circuit has generally considered runoff to be a nonpoint source of pollution which usually results from agricultural, silvicultural, mining and construction activities. See *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990) (giving “runoff of pesticides from farmlands” as example of nonpoint source pollution); *Lyng*, 882 F.2d at 1424 n.8 (giving runoff from fields, forests, mining and construction activity as examples of nonpoint source pollution); *ONRC*, 834 F.2d at 849 n.9 (giving irrigated agriculture and silvicultural activities as examples of nonpoint sources of pollution) (citing *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)); see also *O’Aha’ino v. Galiher*,

28 F. Supp.2d 1258, 1261 (D. Haw. 1998) (concluding point source agricultural exception included farming roads). *But see* Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1321 (D. Or. 1997) (concluding unlined brine pond was point source because "discharger collected the discharge material prior to the discharge," stating, "The fact that those pollutants now migrate through dirt with the help of . . . rain water and gravity . . . does not change the old brine pit's status") (citing as support *Trustees for Alaska*, 749 F.2d at 549 (defining point source broadly and emphasizing distinction between point and nonpoint source seen in manner discharged); *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1173 (D. Mont. 1995) (holding uncollected runoff from unidentifiable source is nonpoint source of pollution)); *Beartooth*, 904 F. Supp. at 1173-74 (concluding mining drainage pits were point sources because polluter was identifiable). The Ninth Circuit has specifically characterized a nonpoint source as "any source of water pollution or pollutants not associated with a discrete conveyance." *Lyng*, 882 F.2d at 1424 n.8 (citing W. RODGERS, *Environmental Law*, 375 (1977)); *see also* *O'Aha'ino*, 28 F. Supp.2d at 1261 (concluding farming roads are nonpoint sources of pollution) (quoting *Lyng*, 882 F.2d at 1424 n.8)); *cf. also* *Umatilla*, 962 F. Supp. at 1321 (defining point source as "any discernible, confined and discrete conveyance" (quoting C.W.A. § 502(14), 33 U.S.C. § 1362(14))); *Beartooth*, 904 F. Supp. at 1173-74 (characterizing nonpoint source polluters as unidentifiable and concluding mine pits were point sources because pits were "discernible, confined and discrete" conveyances). Thus, runoff that emanates from a "discrete confined conveyance" may be deemed a point source for purposes of regulation. *See* *Trustees for Alaska*, 749 F.2d at 557-558 (finding fact term "runoff" is located in separate provisions of CWA for control of nonpoint sources immaterial for distinguishing between point and nonpoint sources of pollution); *cf. also* *Lyng*, 882 F.2d at 1424 n.8 (defining nonpoint source); *O'Aha'ino*, 28 F. Supp.2d at 1261 (defining nonpoint source pollution (quoting *Lyng*, 882 F.2d at 1424 n.8)); *Beartooth*, 904 F. Supp. at 1173 (construing *Trustees for Alaska* to mean nonpoint pollution sources must be unidentifiable) (citing *Trustees for Alaska*, 749 F.2d at 558). Runoff, then, may emanate from either a point, or nonpoint, source. *See* *Trustees for Alaska*, 749 F.2d at 558; *Umatilla*, 962 F. Supp. at 1320 (quoting *Trustees for Alaska*, 749 F.2d at 558 (discussing, and adopting, Tenth Circuit's conclusion *United States v. Earth Sciences, Inc.*)) ("[P]oint and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance."). While runoff which is hard to trace to a specific source cannot, by definition, emanate from a "discrete confined conveyance," runoff from a source that is identifiable may emanate from a "discrete confined conveyance." *See* *Trustees for Alaska*, 749 F.2d at 558 (noting Tenth Circuit in *Earth Sciences* observed Congress characterized runoff as not traceable "to any identifiable point of discharge"); *Beartooth*, 904 F. Supp. at 1173 ("The non-point source designation is limited to uncollected runoff water which is difficult to ascribe to a single polluter.") (citing *Trustees for Alaska*, 749 F.2d at 558); *NRDC*, 915 F.2d at 1316 (presuming CWA did not focus on nonpoint source polluters because they are difficult to identify and regulate). Further, the Ninth Circuit adopted the reasoning of the Tenth Circuit in *United States v. Earth Sciences, Inc.*, in concluding that the fact that CWA specifically mentions the control of runoff in separate provisions than point sources, does not in itself preclude runoff from being considered having emanated from a point source. *See* *Trustees for Alaska*, 749 F.2d 549 at 557-558 (rejecting this argument in supporting exempting mining activities from NPDES permits by adopting reasoning of Tenth Circuit in *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 372 (10th Cir. 1978) (reviewing legislative history and agreeing with observation "Congress rejected an amendment that would have explicitly regulated mining discharges from point sources, because it was duplicative of the Act's general regulatory provisions")); *see also* *Umatilla*, 962 F. Supp. at 1320-21 (explaining Ninth Circuit's adoption of *Earth Sciences* court's reasoning

Nonpoint sources traditionally include any type of activity causing runoff, including agricultural, mining and silvicultural activities.<sup>70</sup> Some courts, however, apply the definition of point source

in their *Trustees for Alaska* decision supported holding brine ponds point sources); *Beartooth*, 904 F. Supp. at 1173 (finding reasoning of Tenth Circuit in *Earth Sciences* persuasive, noting Ninth Circuit adopted *Earth Sciences* court's reasoning in *Trustees for Alaska*, in concluding mining pits are point sources because broadly interpreting point sources "effectuate[s] the remedial purposes of [ ] CWA") (citing *Earth Sciences*, 599 F.2d at 373).

70. See *Shanty Town Assoc. Ltd. Partnership v. EPA*, 843 F.2d 782, 789 n.10 (4th Cir. 1988) (defining nonpoint source pollution as "runoff from agriculture, silviculture, mining, construction, roads, urban development, and other diffuse sources."); *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 652 (Oakes, J., dissenting) ("Nonpoint source pollution is, generally, runoff."), *cert. denied* by *United States v. Villegas*, 512 U.S. 1245 (1994).

Some courts, however, focus on the actual physical entity which released the pollution, generally referred to as the "end of the pipe" emission, such that runoff, for example, down a hill, would be deemed coming from a nonpoint source. See, e.g., *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996) (ruling runoff from construction sight down a hill from nonpoint source), *cert. denied*, 519 U.S. 993 (1996). But see *O'Aha'ino v. Galiher*, 28 F. Supp.2d 1258, 1262 (D. Haw. 1998) (excluding from NPDES permit requirements all construction activities within five acre area beyond planned construction site (quoting 40 C.F.R. § 122.26 (b)(14)(x) (1992))); *Hudson River Fishermen's Ass'n v. Arcuri*, 862 F. Supp. 73, 76 (S.D.N.Y. 1994) (stating abandoned housing construction runoff emanated from point source).

Looking instead to the source of the pollution, though farther both temporally and in proximity from actual physical entrance of the pollutant into navigable waters, some courts have found runoff to be from point sources. See, e.g., *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (identifying sluice box as source of pollutant); *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 47 (5th Cir. 1980) (ruling mining spoil basins' surface runoff during rainfall overflowed from point sources); cf. also *Earth Sciences*, 599 F.2d at 373 (holding congressional intent and legislative history require regulation of "any activity that emits pollution from an identifiable point"). Thus, the focus shifts from the nature of the source as discharge or runoff, to whether the source is identifiable. See Frank, *supra* note 6, at 1300-02 (demonstrating means by which cattle may be become controllable and identifiable and thus point sources). These sources of pollution were identifiable and controllable, thus point sources of pollution. See, e.g., *NRDC*, 915 F.2d at 1316 (presuming Act focused on point source pollution because, unlike nonpoint source pollution, point source pollution is easily regulated and identifiable); see also *Earth Sciences*, 599 F.2d at 371 (noting lack of permit requirement for nonpoint sources due to difficulty in identifying specific polluter).

Indeed, Congress meant to exempt only "runoff pollution . . . that is not traceable to a confined and discrete source." See Robin L. Greenwald, *What's the "Point" of the Clean Water Act Following United States Plaza Health Laboratories, Inc.?: The Second Circuit Acts as a Legislator Rather Than as a Court*, 60 BROOK. L. REV. 689, 707 (1994) (noting Congress's express intent "'point source' be broadly interpreted by including specific, limited examples of what is not a point source"). The National policy of Congress regarding Pollution Prevention is that "pollution should be prevented or reduced at the source whenever feasible." *EPA Memo. on the Definition of Pollution Prevention*, (BNA) No. 5-924, at 113 (May 28, 1992) (adopting Congress's policy enunciated in Pollution Prevention Act of 1990). Further, courts have also held that Congress intended for states to regulate runoff pollution, leaving pollution from an identifiable point source to be regulated under CWA. See Greenwald, *supra*, at 707 n.86 (providing as example *Abston Construction Co., Inc.*, 620 F.2d at 44

broadly.<sup>71</sup> Thus, a "discernible, confined and discrete conveyance"

("The focus of this Act is on the "discernible, confined and discrete" conveyance of the pollutant, which would exclude natural rainfall drainage over a broad area.")); see also Wood, *supra* note 17, at 576 ("Section 402 establishes a permit program which is directed toward identifiable sources of pollution."); Saperstein, *supra* note 10, at 889-90 (noting nonpoint sources are not identifiable). Some commentators, noting Congress's emphasis on controlling identifiable sources, have asserted that "point sources should include natural as well as artificial conveyances . . . as long as it is possible to trace the pollutants back to an identifiable, originating point of discharge." Wood, *supra* note 17, at 577.

In *United States v. Plaza Health Laboratories, Inc.*, however, the Second Circuit noted CWA's emphasis on industrial polluters in holding that a human being, although identifiable, could *not* be a point source of pollution. See *United States v. Plaza Health Labs., Inc.*, 3 F.3d at 643, 646-49 (2d Cir. 1993) (reviewing CWA's language, structure, legislative history, regulatory scheme, and EPA's definition of point source) *cert. denied* by *United States v. Villegas*, 512 U.S. 1245 (1994). The Second Circuit concluded that, although unclear whether CWA's definition of point source included a human being, a human being subject to criminal liability could not be a "discernible, confined and discrete conveyance." *Cf. id.* at 646 (concluding CWA "was never designed to address the random, individual polluter"). In support of its reading of the term "point source," the *Plaza Health* court specifically referenced EPA's definition of point source, which they interpreted to emphasize industrial means of release. *Cf. id.* at 649 ("The EPA stresses that the discharge be 'through pipes, sewers, or other conveyances. . . .'" (quoting 40 C.F.R. § 122.2 (1992))).

In contrast, the dissent in *Plaza Health* focused on EPA's emphasis that nonpoint source pollution is not easily attributable to a specific source. See *id.* at 652 n.3 (Oakes, J., dissenting) (quoting EPA's definition of nonpoint source pollution from EPA Office of Water, Office of Water Regulations and Standards, *Nonpoint Source Guidance 3* (1987)). Judge Oakes, noting that the differentiation between point and nonpoint sources hinged on whether that pollution was "easily attributable . . . to any particular responsible party," concluded that in this case the source, a human being, was a point source because he was identifiable and controllable. *Id.* at 652-53 (discussing controllability theory posited by noted environmentalist Professor William H. Rodgers, Jr. (citing 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.10 at 150 (1986))).

For a critical discussion of the *Plaza Health* decision, and analysis of the reasons to include, or to exclude, human beings from the definition of point source, see generally Stephanie L. Hersperger, Comment, *A Point Source of Pollution Under the Clean Water Act: A Human Being Should Be Included*, 5 DICK. J. ENVTL. L. & POL'Y 97 (1996). For further discussion of the Second Circuit's decision in *Plaza Health*, see *infra* notes 81-85 and accompanying text.

71. See *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) ("[T]he definition of a point source is to be broadly interpreted."), *cert. denied*, 514 U.S. 1082 (1995) (citation omitted); *Plaza Health*, 3 F.3d at 652 (Oakes, J., dissenting) (asserting broadly interpreting point source "is essential to fulfill the mandate of [CWA]" (quoting *Earth Sciences*, 599 F.2d at 373)); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) (defining culvert transferring water from one pond to another as point source in absence of direct addition of pollutants) *rev'd in part on other grounds*, 505 U.S. 557 (1992); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (noting nonpoint sources not determined by activity "but rather by whether the pollution reaches the water through a confined, discrete conveyance"); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979) (noting because not all point sources could be enumerated, Congress deliberately broadly defined term "point source"); *Earth Sciences*, 599 F.2d at 373 (explaining means of determining point source should include "broadest possible definition of any identifiable conveyance"); *Umatilla*, 962

includes "an organized means of channeling and conveying industrial waste."<sup>72</sup> For example, animal feeding farms, abandoned min-

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F.Supp. at 1320 ("The Ninth Circuit has given this definition a broad scope."); *Beartooth*, 904 F. Supp. at 1173 (citing *Earth Sciences*, 559 F.2d at 373 (noting "'point sources' must be interpreted broadly to effectuate the remedial purposes of the CWA")). But see *Plaza Health*, 3 F.3d at 646 (stating, "[i]t is elemental that congress [sic] does not add unnecessary words to statutes," in declining to include human beings among point sources); cf. *E.I. du Pont de Nemours & Co. v. Train* 430 U.S. 112, 116-121 (1977) (applying effluent limitation regulatory scheme to chemical manufacturing industry); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 168 (D.C. Cir. 1982) (deferring to EPA's narrow interpretation of point source).

For example, after reviewing the case law on point sources, the Second Circuit in *Plaza Health* recognized that the term "point source" has been broadly interpreted, particularly in civil and licensing cases. See *Plaza Health*, 3 F.3d at 648-49 (discussing CWA's penalty provisions); see also *National Wildlife*, 693 F.2d at 172 (noting "point source" is term to be read expansively); *Earth Sciences*, 599 F.2d at 373 (noting Congress intended to regulate all possible identifiable sources of pollution); *Kennecott Copper v. EPA*, 612 F.2d 1232, 1246 (10th Cir. 1979) (interpreting language defining point source as reflective of congressional intent that many sources of pollution fall within definition). This principle is also reflected in the Ninth Circuit's opinion in *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Circuit 1984). In that case, the Ninth Circuit determined that placer mines are point sources of pollution. See *id.* at 558. Specifically, the court rejected the argument that because mining activities were referenced in section 304(f)(2)(B), and activities under this provision are not subject to NPDES permit requirements, that all mining activities are point sources of pollution. See *id.* at 557-58. The Ninth Circuit, while recognizing that Congress had rejected Amendments which duplicated regulatory provisions for point and nonpoint sources of pollution, distinguished the present context based on the fact that Congress characterized nonpoint source as "runoff [that] could not be traced to any identifiable point of discharge." *Id.* (citing *Earth Sciences*, 559 F.2d at 373). The court concluded that "when mining activities release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources." *Id.* In this case, a sluice box contained the water prior to its release and, thus, fell within the definition of point source. See *id.*

72. *Plaza Health*, 3 F.3d at 651 (Oakes, J., dissenting). The dissent in *Plaza Health* gave a review of the applicable case law, and concluded, "courts have deemed a broad range of means of depositing pollutants in the country's navigable waters to be point sources." *Id.* This includes redepositing of water, churning and resettlement of water dirt, and contaminated runoff from strip mines. See *id.* (citations omitted). Thus, if pollutants "reach navigable waters by human effort," the pollution may emanate from a point source. See *id.* For a discussion of judicial debate regarding withdrawal, redepositing or alteration of water as being an addition of a pollutant for purposes of the Act, see *supra* note 60; *supra* note 62 and accompanying text.

Further, in focusing on the manner in which pollutants are gathered, human effort in creating a potential discharge meets the definition of point source. See *id.*; see, e.g., *Abston Contr. Co., Inc.*, 620 F.2d at 45 (holding coal miners' activity, gathering waste into piles, constituted point sources); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (holding regulation of channeled runoff, but not unchanneled runoff, permissible).

ing sites, logging operations and dams have been considered "point sources."<sup>73</sup>

In *Concerned Area Residents for the Environment v. Southview Farm* (*Southview Farm*),<sup>74</sup> the Second Circuit determined that the liquid manure spreading processes and trucks used to dump and spread manure onto agricultural fields functioned as point sources of pollution for purposes of the Act.<sup>75</sup> The *Southview Farm* court reasoned that the pollution was collected and conveyed by human effort, and

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73. See, e.g., *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (considering large animal farm as point source), *cert. denied*, 514 U.S. 1082 (1995); *Rybacek v. EPA*, 904 F.2d 1276, 1285-86 (9th Cir. 1990) (categorizing mining activity as point source because runoff originated from sluice box); *Abston Constr. Co., Inc.*, 620 F.2d at 45 (holding contaminated strip mining runoff originated from point source); *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 247, 251 (4th Cir. 1979) (stating pollution from abandoned and active mining point sources must be regulated); *Earth Sciences*, 599 F.2d at 374 (stressing overall pollution from mining activities may be from point source); *Apalachian Power*, 545 F.2d at 1372 (observing rainfall runoff from storage area may have originated from point source); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1321 (D. Or. 1997) (concluding brine pond where pollutants were deposited was point source); *United States v. Frezzo Bros., Inc.*, 546 F. Supp. 713, 718 (E.D. Pa. 1982) (holding mushroom composting runoff, emitted from pipe, result of non agricultural point source activity), *aff'd*, 703 F.2d 62 (3d Cir. 1983) (per curium), *and cert. denied*, 464 U.S. 829 (1983); *O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 642, 655 (E.D. Pa. 1981) (holding collected and channeled landfill surface runoff resulting from rain and gravity constituted discharge by point source). But see *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998) (rejecting logging operation as point source); *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987) (holding nonpoint source pollution of logging operation was not required to have state certification); *Idaho Conservation League v. Caswell*, No. CV 95-394-MHW, 1996 WL 938215, at \*9 (D. Idaho Aug. 12, 1996) (concluding logging activities were not point source).

74. 34 F.3d 114 (2d Cir. 1994).

75. See *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 115 (2d Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995). In *Southview Farm*, the manure originated from a farm located on 1,100 acres of land which had 2,200 cattle. See *id.* at 116. The *Southview Farm* noted that the operation fell within the point source category, which includes concentrated animal feeding operations. See *id.* at 115. Under CWA, a concentrated feeding animal operation (CAFO) is not exempt from obtaining an NPDES permit, despite being considered an agricultural activity. See C.W.A. § 502(14), 33 U.S.C. § 1362(14) ("The term 'point source' means any discernible, confined and discrete conveyance . . . including . . . concentrated animal feeding operation[s] . . ."). Liquid manure from housed cattle located on the farm was transferred to a lagoon via a pipe. See *Southview Farm*, 34 F.3d at 116. These liquids were then spread on fields as fertilizer by pipes connected to either an irrigation system or spray hoses. See *id.* Solid manure waste was transported by trucks, dumped and then spread on the fields. See *id.* The liquid and solid waste polluted a nearby waterway in the form of runoff from the fields when it rained. See *id.*



that the pipes and trucks were “the means by which the pollutants [were] ultimately deposited into a navigable body of water.”<sup>76</sup>

Conversely, in *Newton County Wildlife Ass’n v. Rogers* (Newton County),<sup>77</sup> the Eighth Circuit declined to expand the definition of point source.<sup>78</sup> The *Newton County* court held that proposed logging activities, including the building of roads, were not point sources as defined by CWA.<sup>79</sup> The court looked to the plain language of the Act and the list of exempt silvicultural activities in EPA’s regulations in reaching its decision, noting that Congress did

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76. *Southview Farm*, 34 F.3d at 119 (quoting *Abston Constr. Co., Inc.*, 620 F.2d at 45). Referring to previous decisions, the *Southview Farm* court stressed that the definition of a point source should be interpreted broadly. See *id.* at 118 (citations omitted).

Next, the court adopted the reasoning of the Fifth Circuit in *Sierra Club v. Abston Construction Company, Inc.* and categorized the spray hoses and irrigation system as point sources. See *id.* at 119. In *Abston Construction Company, Inc.*, the Fifth Circuit held that a point source can be defined as one that results in a discharge when human effort “collect[s] and channell[s]” pollutants. See *id.* at 47; cf. also *Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 785 n.2(4th Cir. 1988) (noting unchanneled and uncollected runoff is excluded from point source definition) (citation omitted).

In applying the Fifth Circuit’s rationale, the Second Circuit reasoned that the liquid manure was purposefully transferred to the lagoon and to the fields by the farmers. See *Southview Farm*, 34 F.3d at 119. Further, the *Southview Farm* court held that the means used (pipes, irrigation systems and trucks) constituted point sources. See *id.*

77. 141 F.3d 803 (8th Cir. 1998). USFS sold four parcels of land located in the Ozark National Forest. See *id.* at 806. USFS prepared Environmental Impact Statements and Environmental Assessment Reports for the road construction and logging activities, which would accompany timber harvesting on the land, and concluded that nearby waters would not be significantly effected. See *id.* at 806-07. Several environmental groups and individuals, collectively the Wildlife Association (WA), sued under CWA’s citizen suit provision “to enjoin or set aside” the four timber sales. *Id.* at 806. WA alleged that failure of USFS to require the buyers to obtain a state certification violated CWA. See *id.* at 810 (citing C.W.A. §§ (301(a) & 404, 33 U.S.C. §§ 1311(a) & 1344).

78. See *Newton County Wildlife Ass’n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998) (declining to categorize logging and construction activity as point sources).

79. See *id.*; see also *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987) (declining to require state certification for logging roads) (citing as support *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (referencing CWA section 304(f) (2) (B))). For a discussion of the ONRC court’s use of *Trustees for Alaska* as support for their holding, see *supra* note 38; *infra* note 175 and accompanying text. In *Newton County*, USFS, charged with overseeing national forests, sold timber land from Ozark National Forest to private companies for logging activities. See *Newton County*, 141 F.3d at 806. Roads were subsequently built, and timber harvested for sale. See *id.* at 807. The environmental group WA argued that the sales violated CWA because USFS did not obtain NPDES permits for discharging of pollutants that would result from activities prior to allowing the construction and harvesting to commence. See *id.* at 810.

not list logging and road construction among point sources for purposes of the Act.<sup>80</sup>

Other courts have also deferred to EPA's guidelines in interpreting the provisions of CWA.<sup>81</sup> For example, in *United States v.*

80. See *Newton County*, 141 F.3d at 810 ("EPA regulations do not include the logging and road building activities cited by the [WA] in the narrow list of silvicultural activities that are point sources requiring NPDES permits."); see also *ONRC*, 834 F.2d at 844 (concluding logging road and bridge construction are not point sources subject to NPDES regulation); *O'Aha'ino v. Galiher*, 28 F. Supp.2d 1258, 1261-62 (D. Haw. 1998) (concluding farming roads in case at bar were analogous to logging roads recognized by Ninth Circuit to be excluded from NPDES permit process) (citing as examples *ONRC*, 834 F.2d at 844; *Newton County*, 141 F.3d at 810). Section 301(a) of CWA provides that any discharges of pollutants are illegal "except in compliance with . . . section [401] . . . of this title." C.W.A. § 301(a), 33 U.S.C. § 1311(a). Section 402 states in relevant part that "the Administrator may . . . issue a permit for the discharge of any pollutant . . . upon condition that such discharge will meet . . . such conditions as the Administrator determines are necessary." *Id.* C.W.A. § 402(a)(1)(B), 33 U.S.C. § 1342(a)(1)(B). Further, the Eight Circuit noted that section 404 exempts logging construction activities from dredge and fill permit requirements if in compliance with specified best management practices. See *Newton County*, 141 F.3d at 810. The *Newton County* court found that USFS had promulgated regulations to protect the land in question through appropriate best management standards, and that the activities were conducted in compliance with these standards. See *id.*

81. See, e.g., *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 173 (D.C. Cir. 1982) (noting "Congress generally intended that EPA would exercise substantial discretion in interpreting the Act").

As administrator of CWA, EPA has the authority to regulate the discharge of pollutants from point sources under NPDES. See *National Wildlife*, 693 F.2d at 165-66 (quoting C.W.A. § 301(a), 33 U.S.C. § 1311(a)). States, however, have control over nonpoint source pollution. See *id.* at 176 (discussing CWA's 1972 Amendments). EPA's role in nonpoint pollution control is primarily limited to issuing or withdrawing grants. See *Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 791-92 (4th Cir. 1988) (holding EPA has regulatory powers over specific nonpoint source pollution when state regulation is not possible). This authority over federal grants, however, gives EPA a powerful role in the regulation of nonpoint source pollution. In *Shanty Town Associates Ltd. Partnership v. EPA*, the Worcester County Sanitary Commission (Sanitary Commission) of West Ocean City Maryland petitioned to build a wastewater system to contain and treat sewage from developments on nearby flood plains. See *id.* at 786. EPA determined that any new development would increase the likelihood of waste runoff contamination in nearby waters. See *id.* at 786. To discourage new development on these lands, EPA restricted federal funding to developments in existence at the time of the grant, and lots already part of a planned development prior to EPA's restrictions on the federal grant. See *id.* The Sanitary Commission agreed to EPA's restrictions, which culminated in a consent order, and established a permit system, including appointing various city and state agencies as appeals panels, for those receiving services from the wastewater system. See *id.* at 787. Shanty Town Associates Ltd. Partnership (Shanty Town) planned to develop land they owned in this protected area subsequent to the consent order. See *id.* Their proposed businesses would increase wastewater discharges from 5,200 gallons per day to approximately 30,000 gallons per day. See *id.* Shanty Town's application request for service from the sewage collection facility to cover these additional discharges from their proposed businesses was denied. See *id.* Upon exhausting all local and state appeals under the permit system, Shanty Town brought an action against EPA and the

state and local agencies who denied their application to set aside the grant conditions. *See id.* Shanty Town argued that EPA did not have the authority to regulate nonpoint source pollution, or alternately, that EPA's authority in this particular case to restrict the use of the federal sewage collection facility was arbitrary and capricious. *See id.* They further argued that CWA's lack of direct regulation for nonpoint source pollution, and Congress's policy recognizing states' rights to control water pollution, is evidence that Congress "intend[ed] to prevent EPA from taking any action designed to reduce nonpoint source pollution." *Id.* at 791. The Fourth Circuit characterized Shanty Town's argument, stating, "The argument, in essence, is that the grant conditions conflict with Congress' deliberate decision, in [CWA], to allocate control over nonpoint source pollution and land use in the coastal floodplains area to the states." *Id.* at 790.

EPA responded that CWA gives EPA authority to place conditions on the use of public wastewater treatment systems if necessary to assure compliance with CWA's goals, and thus, it did have authority to deny the permit because any new waste additions would preclude the wastewater treatment facility from meeting water quality standards set by the state. *See id.* at 789. The Fourth Circuit observed that EPA had concluded that "the challenged use restrictions, which would minimize the nonpoint source pollution caused by the new facility by limiting the amount of new development it can support, are necessary to insure that the West Ocean City grant is consistent with [CWA's] water quality goals." *Id.*

The *Shanty Town* court held that EPA has both direct and indirect authority to use conditional funding to reduce the amount of nonpoint sources of pollution. *See id.* at 792. The court based this conclusion on the construction of the statute, legislative history, and deference to EPA's broad grant of authority. *See id.* EPA, and thus the federal government, have "substantial control over the regulation of nonpoint source pollution" by administering the grant program pursuant to CWA section 208 and "using the threat and promise of federal financial assistance" to compel states to control nonpoint source pollution. *See id.* at 791. Further, the court held that the legislative history supports the view that section 208's grant program was intended as a means "to encourage the construction of wastewater treatment facilities that will carry out the goals of the Act, which are, as indicated, to protect water quality from both point and nonpoint source pollution." *Id.* at 792. In conclusion, the Fourth Circuit concluded that the restrictions placed on the use of the sewage collection facility were within the scope of EPA's authority. *See id.*

One way that EPA has the power to regulate nonpoint source pollution, then, is withholding of grants; thus, EPA's denying a permit and attached grant in *Shanty Town* was a permissible use of EPA's power under the Act. *See id.* at 792. In contrast to point source pollution regulation, nonpoint source pollution programs are not compulsory. *See supra* note 10. Thus, EPA does not have the authority to establish such programs for the individual states. *See generally* C.W.A. § 303, 33 U.S.C. § 1313. The courts, however, generally defer to the interpretive guidelines promulgated by EPA in interpreting the provisions of CWA. *See, e.g., National Wildlife*, 693 F.2d at 156 (D.C. Cir. 1982) (considering whether water flowing through dam was "discharge of a pollutant" as defined by CWA). For example, in *National Wildlife*, the D.C. Circuit addressed EPA's categorization of a dam as a nonpoint source. *See id.* at 165. Both parties conceded that a dam may be a point source. *See id.* EPA, however, argued that no discharge occurred when water flowed through the dam into a reservoir. *See id.* at 168. The D.C. Circuit concluded that, based on CWA's plain language and legislative history, EPA's interpretation of the term was not unreasonable, and thus must be deferred to. *See id.* at 171 ("We conclude that EPA's interpretation of the specific provisions of the Act is reasonable and not inconsistent with the legislative purposes and so must be upheld.").

For further discussion of the facts, rationale and holding in *National Wildlife*, see *supra* note 50.

*Plaza Health Laboratories, Inc. (Plaza Health)*,<sup>82</sup> the Second Circuit examined the language, structure and regulatory scheme of the Act, legislative history, relevant case law, and interpretative statements of EPA, applied the rule of lenity, and concluded that a human being was not a point source.<sup>83</sup> The *Plaza Health* court reasoned that the definition of point source “evokes images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways,” and that Congress declined to include a human being among the enumerated list of point sources.<sup>84</sup> In addition, the legislative history and EPA guidelines focus on preventing pollution from industrial dischargers.<sup>85</sup>

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82. 3 F.3d 643 (2d Cir. 1993), *cert. denied by* United States v. Villegas, 512 U.S. 1245 (1994).

83. *See* United States v. Plaza Health Labs., Inc., 3 F.3d 643, 646-50 (2d Cir. 1993), *cert. denied by* United States v. Villegas, 512 U.S. 1245 (1994). In *Plaza Health*, the defendant, an employee of Plaza Health Laboratories, Inc., deposited vials of blood into the Hudson River. *See id.* at 644. The trial court convicted the defendant of knowingly discharging pollutants. *See id.* The defendant, on appeal, argued that a human being cannot be categorized as a point source as defined by CWA, or in the alternative, that it is unclear whether humans can be point sources. *See id.*

84. *Id.* at 646. The Second Circuit addressed the scope of the term “point source.” *See id.* (summarizing proper statutory analysis). First, the *Plaza Health* court noted that the term “point source” does not include or exempt human beings, but rather gives a “lengthy definition” by way of examples. *Id.* (construing examples to limit type of point sources). Second, the *Plaza Health* court determined that Congress intended point sources to apply to “industrial and municipal sources of pollution,” based on the presence of the term “point source” in sections referencing “industrial and municipal sources of pollution,” the absence of the word “person” from the definition of “discharge of a pollutant,” and section 301(a)’s prohibition against adding pollutants *from point sources* as opposed to the addition of pollutants *by persons*. *See id.* at 646-47 (stressing nonsensical meaning of term “point source” were human being included in definition).

85. *See id.* at 646-49. The Second Circuit in *Plaza Health* criticized the district court for relying solely on the broad purpose of the statute. *See id.* at 647. Though recognizing the value in considering a statute’s purpose for interpretation of provisions, the Second Circuit nonetheless concluded CWA’s purpose could not, in this particular case, be dispositive. *See id.* The *Plaza Health* court stated, “[The purpose] ‘is only suggestive, not dispositive of [the issue before us].’ Caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision.” *Id.* (quoting *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982)). The Second Circuit reviewed relevant legislative history, and, although noting Congress’s emphasis on controlling industrial polluters, concluded that there is “no suggestion either in the act itself or in the history of its passage that congress intended the CWA to impose criminal liability on an individual for . . . random acts of human waste disposal.” *Id.* Further, Congress’s policy against broadly construing the provisions of a statute to impose criminal sanctions argued against imposing criminal liability in this case. *See id.* at 647-48 (discussing Rivers and Harbors Act of 1899 upon which CWA was modeled).

After reviewing the case law on point sources, the *Plaza Health* court recognized that the definition of point source has been broadly interpreted, particularly

in civil and liability cases. *See id.* at 648-49; *see also National Wildlife*, 693 F.2d at 172 (D.C. Cir. 1982) (noting "point source" is inclusive term to be read expansively); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979) (interpreting language defining point source as reflective of congressional intent that many sources of pollution fall within definition); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."). The Second Circuit, however, declined to apply the principle advocating broad interpretation of point source to further CWA's remedial goals because judicial decisions applying this principle involved civil-penalty cases. *See Plaza Health*, 3 F.3d at 649. Further, the *Plaza Health* court found that EPA's definition of point source supported their narrow reading. *See id.* at 649 (noting EPA's emphasis "discharge[s] be 'through pipes, sewers, or other conveyances'" (quoting 40 C.F.R. § 122.2 (1992))).

Lastly, finding the Act ambiguous as to whether a human being is a point source, the Second Circuit applied the rule of lenity to the case before them, reversing the defendant's conviction and remanding the case to dismiss the indictment. *See id.* at 649-50 (describing rule of lenity which favors resolution of statutory ambiguities in defendant's favor (citations omitted)). Thus, the rule of lenity was the only basis upon which the Second Circuit concluded that a human being was not a point source. *See id.* The *Plaza Health* court specifically limited its holding, stating, "[W]e conclude that the criminal provisions of the CWA did not clearly proscribe [the defendant's] conduct and did not accord him fair warning of the sanctions the law placed on that conduct. *Under the rule of lenity*, therefore, the prosecutions against him must be dismissed." *Id.* at 649 (emphasis added); *see also Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (agreeing with argument *Plaza Health* did not preclude holding ditch where manure was collected and channeled point source of pollution because *Plaza Health* court "simply refused to treat a human being as a 'point source' under the criminal provisions of the Act by virtue of the rule of lenity") (citation omitted), *cert. denied*, 514 U.S. 1082 (1995).

In contrast to the majority, the dissent focused on the identifiability, and controllability, of a source of pollution as the defining characteristics of a point source. *See Plaza Health*, 3 F.3d at 652 n.3 (Oakes, J., dissenting) (citation omitted). Following this characterization, the dissent concluded that, in this case, the source was identifiable and controllable and could therefore be a point source. *See id.* at 653. Indeed, it has been noted that the jury in *Plaza Health* only considered whether the defendant's car was a point source. *See Greenwald, supra* note 70, at 701-03 (criticizing majority's failure to address jury instructions). Thus, the Second Circuit never decided whether a human being could be a point source. *See id.* (stating jury was never informed persons could be point sources). Human beings, however, do meet the definition of point source. *See id.* at 705 (applying CWA's plain language and general rules of statutory construction). Case law has shown that a point source need not be "the last step in the polluting process." *Id.* at 702 (citing as support *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) (stating leaching from landfill entering navigable waters via pond, and then culvert, was from point source)) *rev'd on other grounds*, 505 U.S. 557 (1992); *see, e.g., Southview Farm*, 34 F.3d at 119 (noting manure spreading vehicles were point sources). Further, human beings are conveyances because they are "identifiable and capable of taking objects from one place to another." *See Greenwald, supra* note 70, at 704 (analyzing meaning of word "conveyance" in point source definition).

For a critical analysis of the majority's opinion in *Plaza Health*, see generally Greenwald, *supra* note 70; Mark J. Dorval, Note, *Discharge of Pollutants Into the Nation's Waters: What Does the CWA Prohibit? - United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993), 13 TEMP. ENVTL. L. & TECH. J. 121 (1994); Deborah

### III. FACTS

In July of 1993, Robert and Diana Burril received a permit to graze fifty head of cattle from the United States Forest Service (USFS) in Oregon's Malheur National Forest.<sup>86</sup> The permit limited the grazing to a specific site located on this federal land.<sup>87</sup> Here, USFS issued the permit without first requiring state certification.<sup>88</sup>

The cattle grazing site is located near the Middle Fork of the John Day River (the John Day River) and Camp Creek, a tributary of the John Day River.<sup>89</sup> The cattle caused pollution in both waterways by runoff created from grazing and by directly depositing their waste into Camp Creek.<sup>90</sup> This waste increased sedimentation and water temperature.<sup>91</sup>

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E. Niehuus, Casenote, *Diluting the Clean Water Act: Will Muddy Waters Flow From United States v. Plaza Health Laboratories, Inc.*? 11 T.M. COOLEY L. REV. 911 (1994). For a discussion of *Southview Farm*, see *supra* notes 74-76 and accompanying text. For examples of judicial decisions holding that human effort in channeling waste is a "discernible, confined and discrete conveyance," see *supra* note 72 and accompanying text. For examples of judicial decisions recognizing that human effort in channeling waste is a "discernible, confined and discrete conveyance," see *supra* note 72 and accompanying text.

86. See *Oregon Natural Desert Ass'n v. Thomas*, (ONDA I), 940 F. Supp. 1534, 1537 (D. Or. 1996), *rev'd sub nom.* *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998); Brief for Appellees, *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35115). The permit, "Term Grazing Permit # 01607 for the Camp Creek allotment," allowed the Burriels access to the federal lands four months a year, until the year 2003. Appellees' Brief, *ONDA II* (Nos. 97-35065, 97-35112, 97-35115).

87. See *ONDA I*, 940 F. Supp. at 1537.

88. Cf. *id.* ("The permit was issued without [section] 402 certification."); see also *Oregon Natural Desert Ass'n v. Dombeck*, (*ONDA II*), Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998), *rev'g* *Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996). Under CWA, certain activities which potentially affect the water quality standards of state waters require certification from the state prior to commencement. See *ONDA II*, 1998 WL 407711, at \*1. Section 401 of CWA requires that any activity which may cause a discharge obtain state certification before a federal agency issues a permit. See C.W.A. § 401(a), 33 U.S.C. § 1341(a).

89. See *ONDA I*, 940 F. Supp. at 1537.

90. See *ONDA II*, 1998 WL 407711, at \*7. It was undisputed by the parties that cattle grazing is an activity that may cause water pollution. See *ONDA I*, 940 F. Supp. at 1541. Further, the district court concluded that there was also undisputed evidence that the Burriels' cattle grazing on the Camp Creek allotment caused pollution in the John Day River and Camp Creek. See *id.*

91. See *ONDA II*, 1998 WL 407711, at \*1. In addition, the pollution has caused an increase in "turbidity, soil compaction, and the reduction of shade and riparian vegetation, and the addition of fecal coliform and fecal streptococci." Appellees' Brief, *ONDA II* (Nos. 97-35065, 97-35112, 97-35115). For further discussion of the known potential environmental effects of cattle grazing on federal lands, see *supra* notes 8 & 10 & 11 & 17.

Several environmental groups, including Oregon Natural Desert Association (collectively ONDA), filed suit against USFS under the citizen suit provision of CWA.<sup>92</sup> ONDA alleged that USFS violated CWA by failing to require the Burrils to obtain state certification.<sup>93</sup> ONDA argued that the pollution resulting from the grazing constituted a discharge and, therefore, applicants for grazing permits were required to obtain state certification.<sup>94</sup> The specific issue before the District Court of Oregon was "whether the reference to 'any discharge into navigable waters' under [section] 401 is limited to point sources."<sup>95</sup>

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92. See *ONDA I*, 940 F. Supp. at 1537. Plaintiffs submitted a notice of intent to file a citizen suit under CWA on March 3, 1994 against USFS for failure to comply with CWA section 401 prior to issuing the Burrils a grazing permit. See *id.*; Appellees' Brief, *ONDA II*, (Nos. 97-35065, 97-35112, 97-35115). USFS asserted that pollution from the permitted grazing activity would emanate from a nonpoint source of pollution and, thus, not be subject to state certification. See Appellees' Brief, *ONDA II*, (Nos. 97-35065, 97-35112, 97-35115). ONDA subsequently filed suit in the United States District Court for the District of Oregon. See Appellees' Brief, *ONDA II*, (Nos. 97-35065, 97-35112, 97-35115).

The civil suit against USFS was filed pursuant to CWA section 505 and section 702 of the Administrative Procedure Act. See *ONDA I*, 940 F. Supp. at 1537. CWA's citizen suit provision states, "any citizen may commence a civil action on his own behalf . . . against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . . who is alleged to be in violation of [CWA]." C.W.A. § 505(a)(1), 33 U.S.C. § 1365(a)(1).

The Confederated Tribes of the Warm Springs Reservation of Oregon (the Tribe) entered the suit as plaintiff-intervenor. See *ONDA I*, 940 F. Supp. at 1536. Grant County, Eastern Oregon Public Lands Coalition, and Robert Burril (defendant-intervenor) entered the suit as defendant-intervenor. See *id.* at 1537; Brief for Appellees, *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35115).

ONDA and the Tribe (plaintiffs) sought a declaratory judgment, injunctive relief suspending the grazing activity, and summary judgment. See *ONDA I*, 940 F. Supp. at 1536-37. In response, USFS file a motion for judgment on the pleadings, or in the alternative, summary judgment. See *id.* at 1537. The defendant-intervenor sought either a dismissal or summary judgment. See *id.*

93. See *ONDA I*, 940 F. Supp. at 1537. The plaintiffs sought a declaratory judgment that any person applying for a federal grazing permit is required to obtain a state certification stating that the grazing will comply with state water quality standards, prior to commencing the activity. See *id.* Further, plaintiffs sought "a declaration that the USFS is violating [section] 401(a) of the CWA by issuing grazing permits without requiring the permittee to first obtain certification from the state of Oregon establishing that the grazing will not violate state water quality standards." *Id.* Lastly, plaintiffs requested an injunction to suspend the Burril's grazing permit until state certification was obtained. See *id.*

94. See *id.* at 1536-37.

95. *Id.* at 1539. The district court in *ONDA I* explained that the issue would be resolved under a summary judgment standard. See *id.* Before discussing the specific issue, the district court addressed, "[a]s a preliminary matter," defendants' three assertions in their motion to dismiss on alternative grounds that plaintiffs "lack [1] standing, [2] the right to judicial review, [3] and/or jurisdiction to bring this suit." *Id.* at 1537. First, the district court concluded that plaintiffs had standing because the three part test for standing requirements, as described in the

Looking to the plain meaning of the term “discharge,” the presence of the word “includes” within CWA’s definition of discharge, and CWA’s legislative history, the district court concluded that Congress did not intend the term “discharge” in section 401 to apply to point sources only.<sup>96</sup> The district court then held that the grazing activity and resulting pollution fell within the ambit of sec-

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United States Supreme Court’s decision in *Lujan v. Defenders of Wildlife*, was satisfied. See *id.* at 1537-38 (quoting three part test of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Defendant-intervenors argued that the plaintiffs lacked standing because (1) plaintiffs did not suffer an injury (2) there was “no connection between the issuance of the permit without state certification and deleterious grazing practices,” and no harm to the Tribe’s treaty rights, and (3) that there was “no redressability because ordering state certification will not guarantee that water quality impacts will be prevented . . . [and] no evidence that the harm will cease if [USFS] orders state certification.” *Id.* at 1538. The district court, however, rejected these assertions, stating that ONDA “satisf[ied] the *Lujan* standing test, having established [1] an injury in fact because plaintiffs live and recreate in the area of the challenged action . . . [2] traceability, in light of [USFS’s] admission that cattle grazing contributes to water pollution, and the showing that pollution in Camp Creek is related to cattle grazing . . . [and 3] redressability . . . since plaintiffs need not establish that following the required procedures will lead to a different result.” *Id.* (internal citations omitted). Further, the Tribe had standing because they also “live and recreate in the challenged area” and have “treaty rights in the John Day River Basin [which were] injured by the alleged violations.” *Id.*

Second, the district court rejected USFS’s argument that the plaintiffs could not enforce water quality standards under CWA’s citizen suit provision because citizens can only sue for effluent limitation violations, which issue from point sources. See *id.* (observing argument was based on Ninth Circuit’s decision in *ONRC* which held there is no right to citizen suit for water quality standard violations) (citing *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987)). Further, the district court rejected defendant-intervenors’ argument that the Tribe failed to notify them of the suit. The district court held that section 505 of the Act permitted citizens to sue to enforce water quality standards, and that an intervenor “did not have to provide separate notice under the CWA . . . [because] notice from [the] environmental organizations was sufficient under the CWA . . . thus plaintiffs provided adequate notice.” *Id.* at 1538-39 (citing *Northwest Env’tl. Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995) (holding, contrary to *ONRC*, section 505 of CWA allows citizens to enforce water quality standards violations), *reh’g denied*, 74 F.3d 945 (9th Cir. 1995), *and cert. denied*, 518 U.S. 1018 (1996); *Lykins v. Westinghouse Elec. Corp.*, 27 E.R.C. 1590, 1599 (E.D. Ky. 1988) (holding no separate notice required for intervenor under CWA); *Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344, 1352-53 (E.D.N.C. 1992) (holding two environmental groups of five sufficient notice under CWA)).

Third, the district court concluded that, contrary to Robert Burill’s assertion, the Tribe did properly allege jurisdiction because the district court can hear all claims arising from federal or treaty law. See *id.* at 1539.

96. See *id.* at 1539, 1541 (“The proposed narrower reading of [section] 401 is rejected by this court, based on the plain meaning of the word ‘discharge’ as used in [section] 401, the statutory definition of ‘discharge,’ and the legislative history of CWA [thus] [t]his Court holds that [section] 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources.”). For the analysis of the *ONDA* court’s decision based on the Act’s plain meaning and legislative history, see *infra* notes 99-106 and accompanying text.



tion 401 of CWA and required a state permit.<sup>97</sup> On appeal, the Ninth Circuit reversed, holding that (1) section 401 of the Clean Water Act only regulates the discharge of pollutants from point sources, and (2) the waste generated from the activity in question did not emanate from a point source.<sup>98</sup>

#### IV. ANALYSIS

##### A. District Court Reasoning

###### 1. Plain Meaning of Discharge

The district court in *Oregon Natural Desert Ass'n v. Thomas (ONDA I)*,<sup>99</sup> first addressed the defendant's argument that the term "discharge" encompasses point sources, nonpoint source with a conveyance, or nonpoint source activity that "fall[s] within the statutory definition of point source."<sup>100</sup> The *ONDA I* court rejected this argument and concluded that this interpretation conflicted with the plain meaning of the term "discharge."<sup>101</sup>

97. See *id.* at 1541 ("This court finds that pollution caused by cattle grazing constitutes a 'discharge . . . into navigable waters' within the meaning of [section] 401 of the CWA. Therefore, state certification under [section] 401 was required before the USFS issued a cattle grazing permit on the Camp Creek allotment.").

98. See *Oregon Natural Desert Association v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998), *rev'g* *Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996). USFS and defendant-intervenors appealed the *ONDA I* court decision. The appellees, ONDA, and appellee-intervenor, the Tribe (collectively ONDA for discussion of the issues on appeal) filed a joint response brief on July 16, 1997. See Brief for Appellees, *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35115). The Ninth Circuit rejected ONDA's argument on appeal that the plain language of section 401 and its legislative history "both support the conclusion that Congress, through [section] 401, has authorized states to regulate all pollution arising from federally permitted activities." Appellees' Brief, *ONDA II*, (Nos. 97-35065, 97-35112, 97-35115); see generally *ONDA II*, 1998 WL 407711, at \*1.

99. 940 F. Supp. 1534 (D. Or. 1996).

100. *Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534, 1540 (D. Or. 1996), *rev'd sub nom.* *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998).

101. See *id.* at 1540 ("The term 'including' in the discharge definition permits additional, unstated meanings." (citations omitted)). The district court narrowed its analysis to the term "discharge," as defined by CWA as "including a 'discharge of a pollutant.'" *Cf. id.* at 1539-40 (citing C.W.A. § 502 (16), 33 U.S.C. § 1362(16)). The *ONDA I* court held that the cattle grazing polluting Camp Creek and the John Day River were discharges requiring state certification, and that the term "discharge" was not limited to point sources. See *id.* at 1534. The *ONDA I* court rejected the defendant's argument that the term only included point sources, and reasoned that a narrow reading of the term contradicted the word's plain meaning. See *id.* at 1540. Given the definition's inclusive nature, nonpoint sources could fall within the ambit of "discharge." See *id.* at 1540 (citing case law interpreting "includes" as word of expansion) (citations omitted). For case law recognizing a broad interpre-

tation of statutory definitions based on the presence of the word "includes," see *supra* note 45.

The district court first noted the relevant statutory language pertinent to their analysis. See *id.* at 1539 (quoting C.W.A. §§ 502(14), 33 U.S.C. §§ 1362(14) (defining point source), 1362(16) (defining discharge), 1362(12) (defining "discharge of a pollutant")). Next, the district court addressed the interpretation of the term "discharge" within section 401. USFS argued that only point sources or "nonpoint sources with a conveyance" fall within the plain meaning of discharge. See *id.* at 1540. The defendant-intervenors argued that only nonpoint sources that "fall within the statutory definition of point source" are discharges. *Id.* The district court rejected these arguments and reasoned that a narrow reading of the term "contradict[ed] the plain meaning of the term 'discharge.'" *Id.* Given the definition's inclusive nature, nonpoint sources of pollution could fall within the ambit of the term "discharge." See *id.* (citing as support "*National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982) (holding that the term 'includes' in the CWA allows for additional, unstated meanings); *Exxon Corp. v. Lujan*, 730 F. Supp. 1535, 1545 (D. Wyo. 1990) (holding that the word 'includes' instead of 'means' indicates that what follows is a non-exclusive list that can be enlarged); *Chemehuevi Indian Tribe v. California St. Bd. of Equalization*, 757 F.2d 1047, 1054 (9th Cir. 1985) ('includes' is a term of enlargement, not of limitation) *rev'd on different grounds* 474 U.S. 9). The district court concluded, "[T]he plain meaning of 'discharge' does not restrict the definition to point sources or nonpoint sources with conveyances." *Id.* For a discussion of *National Wildlife*, which recognizes the broader interpretation of a statutory definition utilizing the word "includes," see *supra* note 50.

The district court then rejected defendants' assertion that USFS's interpretation of discharge under section 401 should be deferred to. See *id.* Noting the two part analysis in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the district court concluded that, even were the language of the statute ambiguous and Congressional intent unclear, deference would not be given to USFS, but to EPA as administrators of CWA. See *id.*

One commentator had pointed out that EPA drafted a revision to the implementing regulations for section 401 following the *ONDA I* decision. See Miles, *supra* note 4, at 194 (citing *Special Report: Despite Possibility of DOJ Court Case Appeal EPA Staff Drafts Regulations for Nonpoint Sources on Federal Lands*, INSIDE EPA'S WATER POL'Y REP., Feb. 26, 1997, at 2). Miles discusses the circumstances surrounding EPA's draft guidelines for section 401 and the subsequent rescission of that draft. See *id.* The EPA draft clearly stated that the term "discharge" includes nonpoint sources of pollution. See *id.* However, this draft came before the Department of Justice (DOJ) had made a decision whether or not to appeal on behalf of USFS. See *id.* (citing *Agencies Delay Appeal on Water Quality Certification Ruling*, INSIDE EPA'S WATER POL'Y REP., Jan. 29, 1997, at 19). It appears that EPA suspended its proposed amendment because of criticism from other agencies for failing to wait until DOJ had made their decision. See *id.* (citing *EPA Suspends Rulemaking on Runoff from Federal Lands*, INSIDE EPA'S WATER POL'Y REP., July 9, 1997, at 8). Before DOJ could make its decision, and EPA could act pursuant to that decision, Miles notes that "the Clinton Administration decided to appeal the *ONDA* decision despite opposition from EPA." *Id.* (citing *Despite EPA Opposition Administration Fights Court Ruling on Water Quality Certification*, INSIDE EPA'S WATER POL'Y REP., July 9, 1997, at 8). She goes on to conclude in a footnote:

It is interesting to observe that had the EPA draft implementing regulations for section 401 been finalized prior to the *ONDA* litigation, proper judicial review by the Ninth Circuit might have entailed the two-step analysis required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the court found 1) that Congress did not express clear intent on this issue in the CWA, and 2) that the EPA interpretation of discharge was reasonable, the EPA interpretation would be entitled to deference. However, since EPA did not clearly express its

## 2. Legislative History

The *ONDA I* court looked to the legislative history of CWA for support.<sup>102</sup> First, the district court noted and rejected the defendant's argument that the Amendments to CWA, particularly those of 1972, show an emphasis on effluent limitations, which replace water quality standards.<sup>103</sup> Second, the district court reviewed section 401(a)'s history, noting that the language of the section remained consistent through the Amendments to CWA.<sup>104</sup> Consequently, the *ONDA I* court found that in enacting CWA, Congress intended for all pollution to be regulated through water quality standards and federal activities to be conducted only in a manner consistent with state water quality standards.<sup>105</sup> The *ONDA I* court reasoned that Congress, by *not* expressly stating that nonpoint source pollution should *not* fall within the ambit of section 401, did *not* intend for

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intent before the *ONDA* litigation began, the Ninth Circuit has no agency interpretation to which it may defer and the issues in *ONDA* cannot be resolved using a *Chevron* analysis. Therefore, the EPA perspective on the matter is not binding, although it should probably have some persuasive power.

*Id.* at n.16. For an in-depth discussion of the Ninth Circuit's subsequent decision, without any reference to EPA's agency interpretation, see *infra* notes 107-43 and accompanying text. For a critical discussion of the Ninth Circuit's failure to consider EPA's interpretation, see *infra* note 152.

102. See *ONDA I*, 940 F. Supp. at 1540-41. The district court rejected defendants' assertion that CWA's legislative history supports a narrow reading of the term "discharge." See *id.* at 1541 ("The 1970 amendments illustrate the broadness of [section] 401; the 1972 amendments support this."). Defendants' asserted that Congress intended CWA to regulate point sources because the 1970 and 1972 CWA Amendments emphasize effluent limitations, and fail to mention nonpoint sources of pollution. See *id.* at 1540 (citation omitted). The *ONDA I* court, however, noted that the 1972 Amendments did not replace Congress's intent that all federal activities comply with water quality standards. See *id.* at 1540-41 (quoting *Northwest Env'tl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) (interpreting 1972 Amendments), *reh'g denied*, 74 F.3d 945 (9th cir. 1995), and *cert. denied*, 518 U.S. 1018 (1996)). For a discussion of the Ninth Circuit's interpretation of CWA's 1972 Amendments in *Northwest Environmental Advocates v. City of Portland*, see *supra* note 34.

103. See *id.* at 1540 (citing S. REP. NO. 92-414 at 69 (1971)). The defendants stressed the absence of discussion on nonpoint sources, and focus on controlling discharges of pollutants, in the legislative history. See *id.*

104. See *id.* The district court stated, "Section 401(a) originated as 21(b) under the Water Quality Improvement Act of 1970. The language of this section is identical to the current Act." *Id.* For further discussion of this argument, supporting a broader interpretation of the term "discharge" in section 401, see *supra* note 45.

105. See *id.* at 1541 (quoting 115 CONG. REC. H28970 (1969) (statement of Senator Cooper) (noting 1970 Amendments emphasized maintenance of water quality standards regardless of pollution source)).

the Amendments to displace regulation of nonpoint source pollution under 401.<sup>106</sup>

## B. Ninth Circuit Reasoning

### 1. Proper Interpretation of the Term "Discharge"

In *ONDA II*, the Ninth Circuit began its analysis by setting forth section 401, the definitions relevant to interpreting the term "discharge" under section 401, and the proper analysis for determining whether nonpoint sources of pollution fall under section 401 review.<sup>107</sup> The *ONDA II* court acknowledged that CWA does not de-

106. See *id.* The *ONDA I* court found support for its reading of the 1972 Amendments by referencing the Ninth Circuit's decision in *Northwest Environmental Advocates v. City of Portland*. See *id.* Specifically, the *ONDA I* court noted that in *Northwest Environmental Advocates* the Ninth Circuit "held that 'nowhere does Congress evidence an intent to preclude the enforcement of water quality standards that have not been translated into effluent discharge limitations.'" *Id.* (quoting *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995), *reh'g denied*, 74 F.3d 945 (9th Cir. 1995), and *cert. denied*, 518 U.S. 1018 (1996)). The Ninth Circuit's interpretation of the 1972 Amendments as a means to "improve enforcement of pollution from point sources, not supplant the old system," led the *ONDA I* court to conclude that CWA's legislative history "supports the conclusion that [section] 401 applies to all federally permitted activities that might result in water pollution." *Id.* (citing *Northwest Environmental Advocates*, 56 F.3d at 986).

107. See *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*3 (9th Cir. July 22, 1998), *rev'g Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996). The *ONDA II* court characterized the issue as "whether the Burril's Forest Service grazing permit requires certification from the State of Oregon." *Id.* *ONDA* argued before the *ONDA II* court that the *ONDA I* court was correct in holding that the cattle grazing was a discharge under section 401's plain language. See Brief for Appellees, *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35115) ("Cattle grazing is an 'activity' that results in 'discharges' to waters of the United States."). Section 401 prohibits the federal government from issuing a permit where "any discharge" may result, thus "the qualifier 'any' clarifies that all 'discharges' are subject to [section] 401." *Id.* The term "discharge" is not limited to point sources, as asserted by USFS, because the definition of the term "discharge" in CWA "includes (but is not limited to) point sources." *Id.* (noting distinction between definitions of discharge and "discharge of a pollutant" in CWA section 502). *ONDA* further argued that even if the term "discharge" is limited, the presence of the word "any" immediately preceding it in section 401 clearly indicates that the term "discharge" as used in section 401 is "without qualification" and should be interpreted broadly. See *id.* (noting Congress intended discharge to have two meanings as evidenced by its presence in two separate definitions).

As a preliminary matter, the *ONDA II* court addressed whether *ONDA* had standing; and if so, whether *ONDA* could bring suit under CWA's citizen suit provision. See *ONDA II*, 1998 WL 407711, at \*1-2 (concluding *ONDA* had standing and could bring suit pursuant to CWA section 505). First, applying the three prong standing test from the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, the *ONDA II* court held that *ONDA*'s claim satisfied the requirements for standing because *ONDA*'s right to recreational use of the John Day River was compromised, and this injury was redressable under CWA. See *id.* (setting forth, and

fine a nonpoint source, but nevertheless distinguished nonpoint from point sources of pollution by comparing examples of each source.<sup>108</sup>

applying, *Lujan* elements to facts at issue) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The *ONDA II* court stated that the water pollution caused by the grazing cattle had injured some of ONDA's members because the members live by, and use, the John Day River's polluted water. *See id.* at \*1 (satisfying element requiring "causal connection between the injury and defendant's conduct").

Appellants argued, however, that the injury was procedural, not concrete, because ONDA's suit sought to compel a procedural requirement, certification, would not improve ONDA's use of the John Day River. *See id.* Appellants further argued ONDA did not have a redressable injury because ONDA's suit would not focus on establishing that "the state would deny certification or that certification would necessitate a change in the grazing operation," thereby resulting in abatement of the water pollution. *Id.* at \*2. The Ninth Circuit first concluded that the water pollution interfering with the use of the river was a concrete interest. *See id.* at \*1 (observing enforcement of state certification, although procedural, impacts environment, hence concerns concrete interest (quoting *Lujan*, 504 U.S. at 572)). The *ONDA II* court specifically referenced their decision in *Salmon River Concerned Citizens v. Robertson* to define, and determine, what constitutes a "concrete interest." *See id.* In *Salmon River*, the Ninth Circuit held that "threatened harm to 'health, recreational use, and enjoyment' from the use of herbicides constitute[d] an impairment of a concrete interest." *Id.* (quoting *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994)). The harm in *ONDA II* was already apparent, and thus, clearly met the threshold of "threatened harm" established by the *Salmon River* court. *Cf. id.* (analogizing harm in *ONDA II* to concrete interest in *Salmon River* and concluding, "Certainly, ONDA has demonstrated a concrete interest where its members reside and engage in recreational activities along polluted waterways"). The Ninth Circuit then stated that "[f]or similar reasons, the appellants' argument that there is no redressable injury must fail." *Id.* at \*2. They concluded ONDA was not required to prove that the state would conclude their review for certification in a manner beneficial to ONDA. *See id.* (citing as support *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1518 (9th Cir. 1992)). In addition, the *ONDA II* court determined that ONDA's burden of proof for "immediacy and redressability" was reduced because they asserted a procedural right similar "to the hypothetical plaintiff, discussed in *Lujan*, who lives adjacent to the construction site for a federally-licensed dam." *Id.* The Ninth Circuit noted that in *Lujan* the hypothetical plaintiff, living next to a dam construction site, would not have to prove that requiring an Environmental Impact Statement (EIS) would change the dams construction plans in order to file suit because a federal agency failed to prepare an EIS. *See id.* (comparing ONDA's procedural right to section 401 review with procedural right to preparation of EIS).

Second, the *ONDA II* court held that CWA's citizen suit provision "authorizes suits for violation of certification requirements," a certification can be violated even if not granted, and that a permit issued without the required state certification violates "the certification requirement under [section] 401 and therefore [is] in violation of an 'effluent standard or limitation' under [section 505]." *Id.* ONDA had a valid claim against USFS because they alleged a violation of the certification requirement: that USFS issued a permit without first obtaining certification. *Cf. id.* (rejecting appellants argument citizen suits can only seek to enforce "the discharge limitations already contained within state certifications"). For the district court's analysis in *ONDA I*, concluding ONDA had standing and the right to bring a citizen suit, see *supra* note 95.

108. *See ONDA II*, 1998 WL 407711, at \*3. The *ONDA II* court first characterized "discernible, confined and discrete conveyances" as including such things "as

The Ninth Circuit next reviewed two statutory interpretations of the term "discharge." First, the *ONDA II* court briefly reviewed the arguments before the district court, and the district court's decision.<sup>109</sup> The plaintiffs in *ONDA I* argued that the term "discharge" in section 401 encompasses both point and nonpoint sources of pollution.<sup>110</sup> The Ninth Circuit noted that the district court found this construction compelling upon analyzing CWA's definitions of "discharge" and "discharge of a pollutant."<sup>111</sup> In doing so, the district court rejected USFS's argument that the term "includes" within the definition of discharge should be interpreted as "limited to point sources but includ[ing] both polluting and nonpolluting releases."<sup>112</sup> Second, the Ninth Circuit noted that the district court's holding relied on the definitional language of discharge and concluded that the district court improperly interpreted section 401 by focusing on one word of the definition.<sup>113</sup> Instead,

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a pipe, ditch, or machine." *Id.* (defining point source) (citing C.W.A. § 502(14), 33 U.S.C. § 1362(14)). The Ninth Circuit looked to its own characterization of nonpoint source in concluding that runoff from agricultural and grazing activities are nonpoint sources of pollution. *See id.* (citing C.W.A. § 502, 33 U.S.C. § 1362 (providing statutory definitions); *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987) ("Nonpoint source pollution is not specifically defined in the Act, but is pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source. Examples of nonpoint source pollution include runoff from irrigated agriculture and silvicultural activities." (citing as support *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984))).

109. *See id.* For the *ONDA I* court's analysis and holding, see *supra* notes 99-106 and accompanying text.

110. *See id.*

111. *Cf. id.* ("In accepting this argument below, the district court relied exclusively on [section] 502 of the Act.") (citing C.W.A. §§ 502(12), (16), 33 U.S.C. §§ 1362(12), (16) (1994)). The *ONDA II* court further noted that the district court reasoned that, because the term "discharge" when unqualified is not *limited* to point sources but rather *includes* the term "discharge of a pollutant" which references point sources, a discharge must include nonpoint source releases as well as point source releases. *See id.* Thus, the *ONDA II* court recognized that, based on this reasoning, the district court "concluded that the term 'discharge' encompassed nonpoint source pollution like runoff from grazing" and had reasoned that the word "includes" demonstrates Congress's intent to allow additional sources of pollution, not just those from point sources, to fall under the definition of discharge. *Id.* For the statutory language of section 502(12) and (16) defining "discharge" and "discharge of a pollutant," see *supra* notes 48-50 and accompanying text.

112. *Id.*

113. *Cf. Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*3 (9th Cir. July 22, 1998) ("We examine 'the language of the governing statute, guided not by a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy.'"), *rev'g Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996) (citations omitted). In contrast, the *ONDA II* court made two determinations which were relevant to its subsequent interpretation of discharge and holding, by refer-

proper interpretation of language within a statute is gleaned from its relation to all its provisions, its purpose and its underlying policy.<sup>114</sup> The Ninth Circuit concluded that the correct statutory interpretation of the term "discharge" in section 401 does not include nonpoint sources of pollution.<sup>115</sup>

encing all the provisions of the Act together, its purpose, and policy. *Cf. id.* at \*6-7 (concluding term "discharge" within CWA refers to releases from point sources while term "runoff" refers to releases from nonpoint sources), \*4-5 (concluding point and nonpoint sources are regulated by completely separate provisions of CWA without overlap).

For an in-depth discussion of the *ONDA I* court's analysis of the term "discharge," see *supra* notes 99-106. For a discussion of section 401 as interpreted by the *ONDA I* court, and the *ONDA I* court's subsequent conclusion that the word "includes" within the definition of discharge refers to including a "discharge of a pollutant" as opposed to including polluting and nonpolluting releases, see *supra* notes 99-106 and accompanying text.

114. See *id.* at \*3 (citing *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987))).

The Ninth Circuit next briefly stated its holding, which reflects application of these principles, as follows: "The Clean Water Act, when examined as a whole, cannot support the conclusion that [section 401] applies to nonpoint sources." *Id.* For a list of authorities relied on by the *ONDA II* court, which focused statutory interpretation on definitional language, see *infra* notes 148-67.

115. See *id.* at \*7. Appellees argued that the term "discharge" should include both nonpoint and point sources of pollution. See *id.* They asserted that the definition of "discharge" is broader than the definition of the term "discharge of a pollutant." *Id.* Thus, the term "discharge" must include nonpoint source pollution. See *id.* On appeal, ONDA argued that the existence of the word "discharge" in two definitions supported its position that the word discharge in section 401 is not limited to point sources. See Brief for Appellees, *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35115). Only the definition "discharge of a pollutant" is limited to point sources. See Appellees' Brief, *ONDA II*, (Nos. 97-35065, 97-35112, 97-35115). In contrast, the term "discharge," because it includes a "discharge of a pollutant," reflects congressional intent that the term "discharge" not be limited to point sources. See *id.* (citing *Power Authority v. Williams*, 101 A.2d 659, 660 (N.Y. App. Div. 1984) (construing congressional intent in using word "includes" in discharge definition); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982) (noting operation of word "includes" in definitions not restrictive like word "means")).

The Ninth Circuit rejected this position relying on *National Wildlife Federation v. Gorsuch*. See *ONDA II*, 1998 WL 407711, at \*7 ("['Discharge' is the broader term because it includes all releases from point sources, whether polluting or nonpolluting.]" (citing *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982))). The Ninth Circuit in *ONDA II* interpreted *National Wildlife* as standing for the proposition that the term "discharge" is a release from a point source, whether polluting or nonpolluting. See *id.* Once a point source has discharged, whether the discharge is added and is a pollutant is a separate issue. *Cf. id.* The *ONDA II* court, referring to *National Wildlife*, stated, "[In *National Wildlife*], the court interpreted 'discharge' in [section 502](16) of the Act to include the release from a point source of turbid water that did not contain any pollutant. This is the logical interpretation of [section 502](16) that comports with the structure and lexicon of [CWA]." *Id.* For an alternate reading of the *National Wildlife* court's analysis, arguing against the Ninth Circuit's position in *ONDA II*, see *infra* notes 150-52 and

## 2. *Distinction in Regulatory Scheme*

The Ninth Circuit next discussed the enactment of CWA, focusing on the regulatory framework established for sources of pollution.<sup>116</sup> The *ONDA II* court found that the 1972 Amendments to the Act shifts pollution prevention regulation away from maintaining permissible levels of pollution within a particular body of water.<sup>117</sup> Instead, the Act focuses on limiting the amount of pollutant emissions from point sources of pollution.<sup>118</sup> In addition, the Ninth Circuit concluded that effluent flows from point sources are

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accompanying text. For a further discussion of the relevant facts, procedural history, and the D.C. Circuit's rationale in *National Wildlife*, see *supra* note 50.

116. See *ONDA II*, 1998 WL 407711, at \*3-4. ONDA argued on appeal that the 1970 legislative history, not the 1972 legislative history, is relevant to interpreting section 401. See Brief for Appellees, Oregon Natural Desert Ass'n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35112). ONDA asserted that "[t]he contemporary legislative history of [section] 401 . . . makes clear that Congress intended [section] 401 to apply to all federally permitted pollution generating activities, regardless of how the 'source' of that pollution is classified." *Id.* Section 401 was adopted in 1970 when there was no distinction between point and nonpoint sources of pollution, and because the relevant language of section 401 has not been amended, only the legislative history prior to section 401's enactment is relevant. See *id.* First, the legislative history shows section 401(a) was intended to apply to all federal activities that might result in water pollution. See *id.* (citations omitted). Second, supporters of the Amendment recognized "that the Federal government was a significant cause of the nation's water pollution problems, and stressed the broad scope of [section 401]." *Id.* (citations omitted). From this survey of the legislative history, ONDA asserted, "Members of both the Senate and House, then, saw [section] 401 as a significant check on any and all federally permitted activities, without distinction as to the 'source' of the pollution." *Id.*

The *ONDA II* court, however, asserted that the current regulatory scheme, addressing point and nonpoint sources of pollution in separate provisions, "*supplanted* the 1970 Water and Environmental Quality Improvement Act by *replacing* water quality standards with point source effluent limitations." *ONDA II*, 1998 WL 407711, at \*3-4 (emphasis added). For a general discussion of the 1972 CWA Amendments' impact on water pollution regulation, see *supra* note 34.

117. See *ONDA II*, 1998 WL 407711, at \*4 (quoting *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990) (citing *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 203 (1976) (explaining flaws in prior regulatory scheme which focused on water quality standards))). For a discussion of CWA's indirect regulation of nonpoint sources, see *supra* notes 10 & 34 and accompanying text.

118. See *id.* (citing precedent in *NRDC*, 915 F.2d at 1316 (footnote omitted)). The *ONDA II* court quoted language from their 1990 opinion in *Natural Resources Defense Council v. EPA* where they discussed the impact of the 1972 Amendments to CWA. See *id.* The *ONDA II* court noted that in that decision, they concluded, [The 1972 Act,] "which made important amendments to the water pollution laws . . . [and] placed certain limits on what an individual firm could discharge, regardless of whether the stream into which it was dumping was overpolluted at the time . . . [.] banned only discharges from point sources. The discharge of pollutants from nonpoint sources—for example, the runoff of pesticides from farmlands—was not directly prohibited. The Act focused on point source polluters presumably because



directly regulated by CWA and require approval through the NPDES program.<sup>119</sup> Nonpoint pollution, however, is regulated indirectly through federal grants to states with EPA approved wastewater treatment plans.<sup>120</sup> Further, the *ONDA II* court noted that the 1987 Amendments to the Act require states to implement management programs for nonpoint source pollution.<sup>121</sup>

The Ninth Circuit stated that this differentiation in the regulation supported its position in *Oregon Natural Resources Council v. United States Forest Service (ONRC)*.<sup>122</sup> The *ONDA II* court reviewed

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they could be identified and regulated more easily than nonpoint source polluters.”

*Id.* In conclusion, the Ninth Circuit stated, “The Clean Water Act thus overhauled the regulation of water quality.” *Id.* For a discussion of the 1972 Amendment’s impact on water regulation as interpreted by the Ninth Circuit subsequent to their *NRDC* decision, see *supra* note 34.

119. See *id.* (citing C.W.A. §§ 301, 402, 33 U.S.C. §§ 1311, 1342). In summary, the *ONDA II* court stated, “The Act prohibits the release of pollutants from point sources except in compliance with an NPDES permit.” *Id.* (citing C.W.A. § 301, 33 U.S.C. § 1311).

120. See *id.* In support of this proposition the *ONDA II* court analyzed section 208 which regulates nonpoint source pollution. See *id.* The *ONDA II* court briefly explained this indirect regulation, which is accomplished through CWA section 208. See *id.* The Ninth Circuit noted, first, that under section 208(b)(2), each state is required to create a wastewater treatment plan containing “procedures for the identification and control of nonpoint source pollution.” *Id.* (citing C.W.A. § 208(b)(2), 33 U.S.C. § 1288(b)(2)). Second, the state must submit the plan to EPA for approval, and if EPA approves the plan “it may make grants to the state to defray the costs of administering the plan, see 33 U.S.C. § 1288(f), or to construct facilities, 33 U.S.C. § 1288(g).” *Id.* From this analysis, the *ONDA II* court concluded, “Thus, the Act provides *no direct mechanism* to control nonpoint source pollution but rather uses the ‘threat and promise’ of federal grants to the states to accomplish this task.” *Id.* (emphasis added) (citing *Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988) (stating, “[I]t is true that [CWA] contains no mechanism for *direct* federal regulation of nonpoint source pollution”). The *ONDA II* court specifically noted the absence of penalties for noncompliance with nonpoint management as additional support for the notion that nonpoint source pollution falls outside NPDES permit requirements. See *id.* (explaining section 208 does “not penalize nonpoint source polluters”) (citing *NRDC*, 915 F.2d at 1316 n.3).

121. See *id.* (citing *NRDC*, F.2d at 1318 (“CWA section 319, 33 U.S.C. [section] 1329, requires states to submit for federal approval nonpoint source reports and management programs [but] does not require states to penalize nonpoint source polluters who fail to adopt best management practices; rather it provides for grants to encourage the adoption of such practices. . . .”). Thus, the *ONDA II* court found the 1987 Amendments lent further support to its conclusion that nonpoint sources of pollution are regulated indirectly stating, “Section [319], added to the Act in 1987, requires states to adopt nonpoint source management programs and similarly provides for grants to encourage a reduction in nonpoint source pollution.” *Cf. id.* (including section 319 in discussion of CWA provisions regulating nonpoint source pollution) (citing *NRDC*, 915 F.2d at 1318).

122. See *Oregon Natural Desert Ass’n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*5 (9th Cir. July 22, 1998) (ruling in *Oregon Natural Resources Council v. United States Forest Service* nonpoint source releases are not required to

the relevant facts and arguments before them in *ONRC*, and commented that in *ONRC* they held that all provisions of CWA section 301 applied to point sources exclusively.<sup>123</sup> Without discussing their analysis in *ONRC*, the *ONDA II* court observed that the “structure and plain language of the Act” led them to conclude that the provision as a whole regulates only point source pollution.<sup>124</sup>

In *ONDA II*, the Ninth Circuit adopted the *ONRC* court’s analysis in reaching their conclusion “with regard to the scope of the term ‘discharge’ in [section 401].”<sup>125</sup> The *ONDA II* court reasoned that limiting the scope of the term “discharge” in section 401 is consistent with congressional intent to focus the Act on effluent

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obtain state certification), *rev’g Oregon Natural Desert Ass’n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996). The *ONRC* decision was of importance to the *ONDA II* court because in *ONRC*, the Ninth Circuit “recognized the Act’s separate treatment of point and nonpoint source pollution.” *Id.*

123. *See id.* The facts the *ONDA II* court set forth were similar to the case before them because *ONRC* involved an environmental group suing under CWA’s citizen suit provision. *See id.* After noting that the plaintiffs in *ONRC* tried to use the citizen suit provision to enjoin a logging operation which caused nonpoint source pollution, the *ONDA II* court stated that CWA does allow a citizen suit “for the violation of an effluent limitation under . . . [section 301].” *Id.* (citing C.W.A. § 505(f)(2), 33 U.S.C. § 1365(f)(2)). Next, the *ONDA II* court stated that the plaintiff in *ONRC* “argued that the effluent limitations of [section 301] applied to nonpoint sources by virtue of [section 301](b)(1)(C), which referenced state water quality standards.” *Id.* USFS argued on appeal that the district court erred in not recognizing that the Ninth Circuit in *ONRC* concluded that section 401 does not encompass nonpoint source pollution. *See* Brief for Appellees, *Oregon Natural Desert Ass’n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35115) (citing USFS brief). *ONDA* asserted that *ONRC* was not applicable because it did not address section 401, thus never concluded section 401 does not apply to nonpoint source pollution. *See id.* Instead, “[p]laintiffs in *ONRC* challenged the Forest Service’s violation of State water quality standards under [section] 303 of the CWA.” *Id.* (citing *ONRC*, 834 F.2d at 848-49).

124. *See ONDA II*, 1998 WL 407711, at \*5. The *ONDA II* court concluded its discussion of *ONRC* by quoting their language in *ONRC* that led them to construe *ONRC* as basing their decision on the “structure and plain language of the Act. . . : ‘The title and construction of section [301](b)(1) lead us to the logical conclusion that the limitations set forth in section [301](b)(1)(C) are “effluent limitations” and, therefore, by definition, applicable only to point sources.’” *Id.* (quoting *ONRC*, 834 F.2d at 850 (citing C.W.A. § 502(11), 33 U.S.C. § 1362(11))). For the proposition that the *ONRC* court’s analysis of section 301 was overruled by the Court’s decision in *PUD*, see *supra* note 42. For the Supreme Court’s analysis of section 301, see generally *PUD*, 511 U.S. 700 (1994).

125. *Id.* Specifically referencing their decision in *ONRC*, the *ONDA II* court stated, “In [*ONRC*] we held that the reference to water quality standards in [section 301](b)(1)(C) did not sweep nonpoint sources into the scope of [section 301]. For similar reasons, [section 303] does not sweep nonpoint sources into the scope of [section 401].” *Id.* For an in-depth discussion of the Ninth Circuit’s opinion in *ONRC*, see *supra* note 38.

limitations.<sup>126</sup> Specifically, any discharge from a licensed activity must comply with sections 301, 302, 303, 306 and 307 of the Act.<sup>127</sup> All of these provisions referenced in section 401 “relate to the regulation of point sources.”<sup>128</sup>

126. *See id.* The *ONDA II* court again discussed the shift in emphasis from water quality standards to effluent limitations after the 1972 Amendments. *See id.* Whereas prior to 1972, state certification of a licensed activity focused on ensuring the activity would not violate state water quality standards, section 401 now requires that the activity comply with *effluent limitations* which are aimed at eliminating the *discharge of pollutants*. *See id.* (citing Pub. L. 91-224, § 21(b)(1), 84 Stat. 91 (1970); S. REP. NO. 414, at 69 (1971), *reprinted* in 1972 U.S.C.C.A.N. at 3764, 3735). If section 401 focuses on regulating *discharges of pollutants*, it logically follows that the term “discharge” in section 401 must only limit discharges which emanate from point sources. *Cf. id.* (eluding to definition of “discharge of a pollutant” which specifically means pollution from point sources). The *ONDA II* court therefore concluded, “The term ‘discharge’ in [section 401] is limited to discharges from point sources.” *Id.*

127. *See id.* (citing C.W.A. § 401(a)(1), 33 U.S.C. § 1341(a)(1)). For the relevant statutory language of section 401(a)(1), see *supra* notes 28 & 38.

128. *Id.* The *ONDA II* court thus agreed with the arguments of the intervenors and rejected ONDA’s assertion that section 303, which is cross referenced in section 401 involves water quality standards, not point sources. *See* Brief for Appellees, Oregon Natural Desert Ass’n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35115) (noting section 303 incorporates section 208 which addresses area-wide waste management plans). The current version of the Act requires compliance with sections 301, 302, 303, 306 and 307 in order to obtain state certification. *See ONDA II*, 1998 WL 407711, at \*5 (quoting C.W.A. § 401(a)(1), 33 U.S.C. § 1341(a)(1)). The *ONDA II* court concluded without discussion that sections 302, 306 and 307 regulate only point sources of pollution. *See id.* The Ninth Circuit’s decision in *ORNC* established that section 301 only applies to point source pollution. *See id.* The *ONDA II* court concluded that the water quality standards in section 303 may be applied once the effluent limitations are met. *See id.* Section 303 requires states to establish water quality standards and create plans to ensure water quality standards are met. *See id.* Appellees argued that section 303 regulates nonpoint sources of pollution because it addresses water quality standards. *See id.* The *ONDA II* court, however, concluded, similar to section 301 discussed in *ONRC*, the fact that 303 references water quality standards does not mean it regulates nonpoint source pollution. *See id.* Water quality standards do not just regulate nonpoint source pollution, but can be established to regulate point source pollution. *See id.* Like the water quality standards in section 301(b)(1)(C), as referenced in section 401, water quality standards “provide ‘a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.’” *Id.* (quoting *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n. 12 (1976)).

The Ninth Circuit observed that water quality standards were held by the Court to be allowable supplemental measures under section 401 in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*. *See id.* at \*6. Citing *PUD*, ONDA noted that the Court concluded water quality standards may be maintained by means other than effluent limitations, which are for point sources of pollution, and construed *PUD* as an example of a Supreme Court decision that “has held that the state’s power under [section] 401 to address polluting activities on federal lands is quite broad, and plainly includes the power to regulate all federally permitted sources of pollution, even if they are not point sources.” Brief for Appellees,

### 3. Characterization of Point Source Within CWA

#### a. Point sources release of effluent, not runoff

The Ninth Circuit next addressed the use of the terms “discharge” and “runoff” within CWA to support the proposition that the term “discharge” encompasses only point sources.<sup>129</sup> The *ONDA II* court found that Congress did not intend to include the term “runoff” in section 401, as it had in other provisions of CWA.<sup>130</sup> Further, Congress characterized nonpoint source pollu-

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Oregon Natural Desert Ass'n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35115).

In rejecting appellees reliance on *PUD*, the Ninth Circuit dismissed the proposition that *PUD* broadened the meaning of the term “discharge” under section 401. See *ONDA II*, 1998 WL 407711, at \*6. First, the Ninth Circuit discussed the relevant facts of *PUD*. See *id.* In that case, the State of Washington conditioned a state permit on an applicant for a federal licence to build a dam complying with “minimum stream flows in order to protect fisheries.” *Id.* (citing *PUD*, 511 U.S. at 712). Distinguishing *PUD* on its facts, the *ONDA II* court specifically pointed out that the parties in *PUD* conceded that discharges would occur from building and operating the dam. See *id.* (citing *PUD*, 511 U.S. at 711). Second, the Ninth Circuit concluded that the release of dredge and fill material and the release of water from a tailrace “would involve point sources; the tailrace is a conveyance and the dredge and fill material would presumably involve a conveyance or rolling stock.” *Id.* Lastly, recognizing that the water quality conditions in *PUD* were not related to the discharges, the Ninth Circuit noted that the *PUD* court held the limitations to be appropriate under section 401 because “a state is free to impose such water-quality limitations ‘once the threshold condition, the existence of a discharge, is satisfied.’” *Id.* (quoting *PUD*, 511 U.S. at 712). Thus, the Ninth Circuit construed *PUD* as supporting its interpretation that discharges only include point sources because the water quality conditions were allowable since the discharges in *PUD* emanated from a point source. See *id.*

For a further discussion of the Court's decision in *PUD*, see *supra* notes 35-42 and accompanying text.

129. See *ONDA II*, 1998 WL 407711, at \*6-7. The *ONDA II* court found further support for rejecting appellee's argument that nonpoint source pollution, such as runoff from grazing, falls under the term “discharge,” by surveying all provision of CWA. Cf. *id.* The Ninth Circuit observed that the term “discharge” is referred to throughout CWA as the “release of effluent from a point source,” while the term “runoff” is used in provisions that address wastewater plans and management of nonpoint sources of pollution. See *id.* at \*6 (providing CWA sections 208 (“describing urban wastewater plans”) and 404(f) (“providing guidelines for identification of nonpoint sources of pollution”) as examples of CWA provisions referencing runoff). The Ninth Circuit further distinguished the use of discharge from runoff by noting the absence of a specific reference to discharge as nonpoint pollution, and the absence of the term “runoff” in section 401. See *id.* (“Neither the phrase ‘nonpoint source discharge’ nor the phrase ‘discharge from a nonpoint source’ appears in the Act [and] [s]ection [401] contains no reference to runoff.”).

130. See *id.* at \*6. The Ninth Circuit cited section 313 in support of its position. See *id.* First, the *ONDA II* court quoted the relevant language of section 313(a), “[Section 313] . . . directs federal agencies ‘engaged in any activity which may result in the discharge or runoff of pollutants’ to comply with applicable water quality standards.” (quoting C.W.A. § 313(a), 33 U.S.C. § 1323(a)) (emphasis added). Second, the Ninth Circuit construed this provision as “plainly appl[ying] to

tion as runoff.<sup>131</sup> The Ninth Circuit concluded that “[t]he terminology employed throughout the Clean Water Act cuts against ONDA’s argument that the term ‘discharge’ includes nonpoint source pollution like runoff from grazing.”<sup>132</sup>

*b. Cows are not point sources*

The Ninth Circuit then considered intervenor and appellees’ argument that grazing cattle are similar to point sources of pollution and should be included within the ambit of a “discernable, confined and discrete conveyance.”<sup>133</sup> First, as a threshold matter, the court noted that Congress did not include animals among the enumerated point sources of pollution.<sup>134</sup> The *ONDA II* court then analogized grazing cattle to human beings, noting that the Second Circuit refused to characterize human beings as point sources of pollution for purposes of CWA.<sup>135</sup> The Ninth Circuit concluded that grazing cattle do not fall within the definition of point source.<sup>136</sup> Second, the *ONDA II* court addressed the intervenor’s

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nonpoint sources of pollution on federal land.” *Id.* Lastly, the Ninth Circuit reasoned that “[h]ad Congress intended to require certification for runoff as well as discharges, it could easily have written [runoff into section 401] to mirror the language of [section 313] . . . .” *Id.* (citing C.W.A. § 313(a), 33 U.S.C. § 1323(a)).

131. *See id.* at \*6-\*7 (quoting *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)). Looking to its previous decisions, the *ONDA II* court discussed how the Ninth Circuit characterized nonpoint source pollution, and asserted they “recognize[d] the distinction between the terms ‘discharge’ and ‘runoff.’” *See id.* (quoting *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987) (giving examples of nonpoint source pollution, irrigated agricultural and silvicultural activity runoff); *Trustees for Alaska*, 749 F.2d at 558 (characterizing runoff as untraceable “to any identifiable point of discharge”).

132. *Id.* at \*6.

133. *See id.* at \*7. The intervenor and appellees argued that the cattle resemble a point source as defined by CWA because they are normally confined by man-made fences, and directly deposit their waste into the stream. *See id.*

134. *See id.* *Oregon Natural Desert Ass’n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*7 (9th Cir. July 22, 1998) (citing C.W.A. § 502(14), 33 U.S.C. § 1362(14)), *rev’g* *Oregon Natural Desert Ass’n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996). For the statutory language of section 502(14) defining the term “point source,” see *supra* note 54 and accompanying text.

135. *See id.* (citing *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993), *cert. denied* by *United States v. Villegas*, 512 U.S. 1245 (1994)). The Ninth Circuit “agree[d] with the Second Circuit that the term ‘point source’ does not include a human being, or any other animal.” *Id.* (citing *Plaza Health*, 3 F.3d at 649). For a discussion of the Second Circuit’s decision in *Plaza Health*, see *supra* notes 82-85 and accompanying text.

136. *See id.* The Ninth Circuit reasoned that, like human beings, grazing cattle roam freely. *Cf. id.* (refusing to consider grazing cattle point source based on fact they may potentially be “controlled by manmade structures such as fences”). Thus, the court concluded that “[i]t would be strange indeed to classify as a point source something as inherently mobile as a cow.” *Id.*

argument that these grazing cattle “may constitute a ‘concentrated animal feeding operation.’”<sup>137</sup> The Ninth Circuit, though declining to reach a decision on this question because it was not properly before the court, nonetheless stated that “[t]his position is not tenable.”<sup>138</sup>

#### 4. *ONDA II* Court's Expansion of Its Decision

Recognizing the potential importance of this issue, the *ONDA II* court expressly expanded their holding from the facts of the case.<sup>139</sup> The Ninth Circuit provided: “The Clean Water Act, when examined as a whole, cannot support the conclusion that [section 401] applies to nonpoint sources.”<sup>140</sup> Thus, the *ONDA II* court stated, “[W]e hold that certification under [section 401] is not required for grazing permits or other federal licenses that may cause pollution solely from nonpoint sources.”<sup>141</sup> In classifying all grazing activity as nonpoint source pollution, the Ninth Circuit attempted to convey that its holding should be applied to all traditional sources of nonpoint source pollution, regardless of whether it emanates from a conveyance or falls within the definition of the term “point source.”<sup>142</sup> The *ONDA II* court reversed the judgment of the district court and remanded for entry of judgment in favor of USFS.<sup>143</sup>

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137. *Id.* The intervenors argued that the cattle constituted a “concentrated animal feeding operation” (CAFO), which is included in the definition of point source. *Id.* (citing C.W.A. § 502(14), 33 U.S.C. § 1362(14)).

138. *Id.* The Ninth Circuit rejected this argument without discussion, noting that the determination of what constitutes a CAFO lies with the Director of the NPDES program and was not at issue before the court. *See id.* (citation omitted).

139. *See id.* Oregon Natural Desert Ass'n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*7 (9th Cir. July 22, 1998), *rev'g* Oregon Natural Desert Ass'n v. Thomas, 940 F. Supp. 1534 (D. Or. 1996). For a critical discussion of *ONDA II*'s expansive holding, see *infra* notes 144-93 and accompanying text. For a discussion of the implications of the *ONDA II* court's expansive holding, see *infra* notes 194-207 and accompanying text.

140. *Id.* at \*3. In their brief submitted to the Ninth Circuit, ONDA responded to the intervenor's argument that deference was due USFS's interpretation of section 401. *See* Brief for Appellees, Oregon Natural Desert Ass'n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (Nos. 97-35065, 97-35112, 97-35115). ONDA asserted that section 401 is regulated by EPA, and thus EPA's interpretation is due deference. *See id.* ONDA states, “EPA agrees with plaintiffs interpretation of [section] 401, and has so informed the Justice Department, although the Justice Department has elected not to inform this Court of EPA's position.” *Id.* Neither the Intervenor's argument asserting deference to USFS, nor EPA's position on this issue, is mentioned by the Ninth Circuit in *ONDA II*. *See generally* *ONDA II*, 1998 WL 407711, at \*1.

141. *ONDA II*, 1998 WL 407711, at \*7.

142. *See id.*

143. *See id.* at \*8.

### C. Critical Analysis

In *ONDA II*, the Ninth Circuit incorrectly concluded that all “nonpoint sources of pollution” are excluded from regulation under section 401 of CWA.<sup>144</sup> By adopting a narrow definition of discharge, the Ninth Circuit undermined the goals of CWA.<sup>145</sup> Moreover, the court improperly applied the definition of point source, and ignored their own characterization of nonpoint sources.<sup>146</sup> As a result, the Ninth Circuit has incorrectly narrowed the scope of pollution which falls under section 401 in concluding that grazing cattle, and any source of runoff, cannot potentially be deemed a point source of pollution subject to regulation under section 401.<sup>147</sup>

#### 1. The Two Discharges in *ONDA II*

The Ninth Circuit incorrectly concluded that it chose a broad reading of the term “discharge.”<sup>148</sup> The *ONDA II* court contended

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144. See *id.* at \*6-7; see also Miles, *supra* note 4, at 219 (discussing federal water pollution control policy in asserting term “discharge” should be interpreted based on policy).

145. See *ONDA II*, 1998 WL 407711, at \*7 (adopting narrow definition of discharge). CWA’s primary goal is to eliminate *identifiable* sources of pollution from the nation’s waters. See *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (asserting all pollution must be regulated to achieve CWA’s goals); Wood, *supra* note 17, at 580 (“Limiting the class of sources subject to the NPDES system frustrates the purposes of the CWA . . .”). For a discussion of possible means to include nonpoint point source pollution within the ambit of section 401, see *supra* notes 16 & 17 & 64-85 and accompanying text. For a list of cases, including decisions from the Ninth Circuit, characterizing pollution sources based on the trait of identifiability, and whether the pollution source is a “discernible, confined and discrete conveyance,” regardless of the type of pollution, see *supra* note 69 & 70. For CWA’s statutory purpose and goals, see *supra* notes 1-4 & 24-25 and accompanying text.

146. For a discussion of the means used by courts to distinguish between point and nonpoint sources, see *supra* notes 69-71 and accompanying text.

147. Cf. *ONDA II*, 1998 WL 407711, at \*7 (refusing to include cattle as point sources of pollution). For a further discussion of the *ONDA II* court’s determination that grazing cattle are not point sources, see *infra* notes 168-88 and accompanying text. In holding that nonpoint sources with a conveyance or nonpoint sources which fall within the definition of point source, are excluded from 401 review, Ninth Circuit ignores their own decisions, which clearly allow runoff which emanates from a “discrete, confined conveyance” to fall within the definition of point source and recognize that point sources should be broadly interpreted to meet CWA’s goals. See *supra* notes 69-73 and accompanying text. Further, the *ONDA II* court expanded its decision beyond the issue before them because the defendants conceded that nonpoint sources with a conveyance do fall within the plain meaning of discharge. See *supra* note 101.

148. Cf. *ONDA II*, 1998 WL 407711, at \*7 (relying on case law interpreting “discharge of a pollutant” as opposed to language “any discharge” within section 401(a)). For a list of cases specifically analyzing the term “discharge of a pollutant,” including *Oregon Natural Resources Council v. United States Forest Service*, *Natural*

that its interpretation of discharge was broad because it included all releases only from point sources.<sup>149</sup> In support of this rationale, the Ninth Circuit relied on a distinguishable case. In *National Wildlife Federation v. Gorsuch* (*National Wildlife*),<sup>150</sup> the D.C. Circuit's reasoning supports the proposition that "discharge" and "discharge of a pollutant" are discrete terms based on the plain language of the Act.<sup>151</sup> Further, the *National Wildlife* court specifically analyzed the

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*Resources Defense Council v. EPA and National Wildlife Federation v. Gorsuch* relied on by the *ONDA II* court, see *supra* notes 60-61 and accompanying text.

149. See *id.* at \*7; *supra* note 115.

150. 693 F.2d 156 (D.C. Cir. 1982). For the facts, holding and rationale in *National Wildlife Federation v. Gorsuch*, see *supra* note 50.

151. See *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982) (differentiating definitions based on use of "means" or "includes" in analyzing working of "pollutant" definition). The D.C. Circuit in *National Wildlife* rejected the argument that the terms "pollutant" and "pollution" should be equated, because Congress gave the terms two discrete definitions. See *id.* at 172-73 ("Thus, while Congress did not specifically exclude dams from the NPDES program, it expressed neither specific intent to include them nor general intent to equate 'pollutant' and 'pollution.'"). Although the term "pollution" uses the word "means," it encompasses a wide range of substances which can be categorized as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." C.W.A. § 502(19), 33 U.S.C. § 1362(19). The term "pollutant," however, is defined by an extensive list of examples. See C.W.A. § 502(6), 33 U.S.C. § 1362(6). In analyzing the "pollutant" definition, the D.C. Circuit reasoned that the definition of pollutant used the "restrictive phrasing . . . 'means' . . . rather than the looser phrase 'includes,' used elsewhere in the Act." *Id.* at 172. Thus, while the pollution in question in *National Wildlife* may have fallen within the "pollution" definition, it did not fall within the narrower, more limited and precise "pollutant" definition. See *National Wildlife*, 693 F.2d at 173.

The *National Wildlife* court specifically listed "discharge" in section 311 as a term which uses a "looser" phrase. Cf. *id.* at 172 n.49 (construing "pollutant" definition as restrictive based on presence of word "means"). The definition of the term "discharge" in CWA section 311 employs the language "means . . . but is not limited to." See C.W.A. § 311(a)(2), 33 U.S.C. § 1321(a)(2). Similarly, the definition of the term "discharge" in section 502 uses the word "includes;" however, nowhere does the more limiting word "means" appear. See C.W.A. § 502(16), 33 U.S.C. § 1362(16) (defining discharge as "*includ[ing]* a discharge of a pollutant, and a discharge of pollutants" (emphasis added)). In contrast to the term "discharge" in section 502, the term "discharge of a pollutant's" definition uses the word "means" without the qualifying language "but is not limited to" used in CWA section 311's discharge definition. See C.W.A. § 502(12), 33 U.S.C. § 1362(12); see also *National Wildlife*, 693 F.3d at 172, 172 n.49 (providing CWA definitions using non-exclusive phrasing "means . . . but is not limited to"). Thus, "discharge of a pollutant," like "pollutant," which Congress limited by the use of the word "means," only encompasses the stated meaning. Cf. *National Wildlife*, 693 F.3d at 172 (explaining general rules of statutory construction) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 n. 10 (quoting *C. SANDS, STATUTES AND STATUTORY CONSTRUCTION* § 47.07 (4th ed. Supp. 1982))). Under the *National Wildlife* rationale, Congress intended the term "discharge" in CWA section 502 to include, but not be limited to, point source discharges. Cf. *id.* at 172 n.49 (highlighting words "includes, but is not limited to . . ." in discharge definition); see also Donahue, *supra* note 8, at 230 ("If Congress had intended otherwise, it would simply have said, one more time, 'discharge means . . .'").



elements of the term “discharge of a pollutant” under section 402, which it considered to be the narrower term, and not the term “discharge” as used in section 401, which would arguably have a broader meaning under the *National Wildlife* analysis.<sup>152</sup>

For other Ninth Circuit judicial decisions differentiating terms based on the presence of the word “includes,” see *supra* notes 43-47 and accompanying text (discussing Ninth Circuit split); *supra* notes 38 (discussing *Oregon Natural Resources Council v. United States Forest Service*) & note 62 (discussing *North Carolina v. Federal Energy Regulatory Commission*); *supra* notes 99-143 and accompanying text (discussing *ONDA I* and *ONDA II*).

152. Cf. *National Wildlife*, 693 F.2d at 171 (“The statutory question is whether any or all of these conditions constitute the ‘addition of any pollutant to navigable waters from any point source’ so as to require EPA to issue NPDES permits for dams under [section] 402.” (quoting “discharge of a pollutant” definition, C.W.A. § 502(12), 33 U.S.C. § 1362(12))). For the relevant statutory language of CWA section 401(a), see *supra* notes 28 & 38. For the relevant statutory language of CWA section 402, see *supra* note 26. The *ONDA II* court’s reliance on *National Wildlife* for the proposition that the broader reading of the term “discharge” includes polluting and nonpolluting pollutants is inaccurate. Compare *ONDA II*, 1998 WL 407711, at \*5 (stating *National Wildlife* court interpreted CWA section 502 term “discharge”) with *National Wildlife*, 693 F.2d at 171 (restating issue resolution required interpretation of term “discharge of a pollutant”). First, the *National Wildlife* court was determining whether an activity required a federal permit, or should be left to state regulation. See *id.* at 171. In contrast, *ONDA II* addressed whether an activity which already had a federal permit should be subject to state review. See *ONDA II*, 1998 WL 407711, at \*1.

Second, the *National Wildlife* court focused on interpreting the meaning and scope of the terms “pollutant,” “addition,” and “from” in the definition of “discharge of a pollutant.” See *National Wildlife*, 693 F.2d at 156. Focusing on a narrow reading of “discharge of a pollutant” would require an addition of a pollutant. See *id.* at 176. In contrast, a broader reading of the phrase would allow all pollution added to navigable waters from a point source to fall within the definition, not simply those additions that are pollutants. See *id.* at 175-76. But this elaboration on what a broader reading of section 402 entails was limited in context to analyzing the term “discharge of a pollutant” under section 402, and did not address the language “any discharge” or the operation of the term “discharge” as used in section 401. See *National Wildlife*, 693 F.2d at 171. The D.C. Circuit held that the pollution at issue was not a “pollutant” because of the narrower phrasing of the term’s definition, which utilizes the word “means.” See *id.* at 171-72. Further, unlike the *ONDA II* court’s analysis of the terms “discharge” and “discharge of a pollutant,” the *National Wildlife* court concluded that the presence of two discrete definitions weighed against equating the terms “pollutant” and “pollution.” Compare *ONDA II*, 1998 WL 407711, at \*3 (declining to focus on statutory definitional language in construing term “discharge”) with *National Wildlife*, 693 F.2d at 173 (discussing textual changes in “pollutant” definition during CWA’s 1972 Amendments). Thus, the term “pollution” would not include all pollutants. See *National Wildlife*, 693 F.2d at 173. In contrast, the *ONDA II* court appears to have applied the *National Wildlife* court’s analysis of words within a different definition, “discharge of a pollutant,” in construing the meaning of the term “discharge.” Cf. *ONDA II*, 1998 WL 407711, at \*7 (explaining *National Wildlife* holding). The *ONDA II* court reasoned that because “discharge of a pollutant” excludes pollution which does not meet the “pollutant” definition, that the term “discharge” includes pollution not meeting the “pollutant” definition. Cf. *id.* at \*7 (“[In *National Wildlife*], the court interpreted ‘discharge’ in [CWA section 501](16) . . . to include the release from a point source of turbid water that did not contain any pollutant.”). The

*National Wildlife* court, however, did not address the term "discharge" from section 502(16) and the *ONDA II* court's reasoning supports the proposition that because the term "pollutant" in "discharge of a pollutant" does not include pollution sources which do not meet the definition of point source, that the term "discharge" includes sources not meeting the definition of point sources, i.e. nonpoint pollution sources. *Cf. id.* (inferring inclusion in "discharge" definition what is excluded from "pollutant" definition). While analyzing the term "pollutant's" scope, the *National Wildlife* court noted that Congress expressly recognized that analysis of the terms in section 502, particularly consideration of the precise wording comprising the definitions, was essential to understanding the Act. *See National Wildlife*, 693 F.2d at 173 n.52. The Congressional language quoted by the *National Wildlife* court offered both "discharge" and "discharge of a pollutant" as terms whose definitional language should be carefully considered in analyzing their particular meaning. *See id.* The *ONDA II* court did not accurately apply the principles of statutory construction utilized by the *National Wildlife* court in determining the broader interpretation of the term "discharge." *Cf. ONDA II*, 1998 WL 407711, at \*3 (explaining, and declining to follow, analysis of *ONDA I* court which more accurately reflects the *National Wildlife* court's rationale by focusing on definitional words "means" and "includes"). Applying the reasoning of the *National Wildlife* court, the term "discharge" is the broader term, as was the term "pollution," because Congress chose to include a "discharge of a pollutant," which only encompasses point source pollution and excludes all other pollution releases, but not exclude something other than a "discharge of a pollutant."

Third, the D.C. Circuit noted that the legislative history supported a finding on either side of the interpretations for what constitutes a "pollutant" and an "addition," and specifically deferred to EPA's interpretation. *See National Wildlife*, 693 F.2d at 173 (discussing term "pollutant") & 175 (discussing word "addition"). This deference, in effect, exempted a point source of pollution, the dam, from regulation under section 402. *See id.* at 176. Indeed, although recognizing the dual regulatory schemes for point versus nonpoint sources of pollution, the *National Wildlife* court nonetheless noted that some point sources were arguably intended to be regulated by the states. *See id.* Thus, *National Wildlife* does not support the *ONDA II* court's assertion that regulation of point and nonpoint sources of pollution are always regulated separately by dictates of CWA, and thus nonpoint source pollution could not be subject to section 401 review. *Cf. id.* Further, it can be argued that the two conflicting views regarding the scope of the term "discharge" discussed in *ONDA I* and *ONDA II*, similar to the opposing statutory interpretations considered in *National Wildlife*, are equally valid statutory interpretations, and that policy should be considered in determining which to adopt. *See Donahue, supra* note 8, at 238 (noting validity of both interpretations); *see generally Miles, supra* note 4, at 219-221 (giving policy reasons in favor of broad reading of discharge). For a discussion of differing ways to interpret the plain language of the term "discharge," as used in section 401's phrase "any discharge," (broadly v. narrowly) *see supra* note 45. For the operation of the terms "includes" and "means" within a statutory definition for purposes of analysis and interpretation, *see supra* notes 45 & 50.

It is interesting to note that the *ONDA II* court relied on judicial decisions whose holdings were based in part on deference to EPA's interpretation of CWA. *See supra* notes 38 (discussing *Oregon Resources Defense Council v. United States Forest Service*) & note 50 (discussing *National Wildlife Federation v. Gorsuch*); *supra* notes 70 & 81-85 and accompanying text (discussing *United States v. Plaza Health Laboratories, Inc.*). In contrast, although EPA did not issue an official statement concerning the issue before the *ONDA II* court, the *ONDA II* court chose not to address EPA's interpretation of the term "discharge" in section 401 made known to them by ONDA, which supported the *ONDA I* court's analysis and conclusion regarding the scope of the term "discharge." *See supra* notes 101 & 140.

In contrast, the Ninth Circuit specifically addressed the scope of the term “discharge,” from the language “any discharge,” in section 401, and rejected any alternate interpretation of the term “discharge.”<sup>153</sup> Further, in analyzing the statutory definition of discharge, the *ONDA II* court equated the terms “discharge” and “discharge of a pollutant.”<sup>154</sup> The distinction is an important one: in concluding that the broader reading of the term “discharge” means *all* releases of pollution from *point sources*, the *ONDA II* court significantly narrowed the coverage of section 401 by focusing on one type of discharge regulated under CWA.<sup>155</sup>

In distinguishing between nonpoint and point sources of pollution, again, the Ninth Circuit inappropriately focused on the term “discharge of a pollutant.”<sup>156</sup> The *ONDA II* court relied on its decision in *ONRC*, which specifically addresses section 301 of CWA.<sup>157</sup> The Ninth Circuit’s analysis and decision in *ONRC*, inter-

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153. See *Oregon Natural Desert Ass’n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*7 (9th Cir. July 22, 1998) (asserting correct interpretation of term “discharge” is inclusion of polluting and nonpolluting releases), *rev’g* *Oregon Natural Desert Ass’n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996). For an analysis of the Ninth Circuit’s rationale in *ONDA II*, overturning the *ONDA I* court’s opinion, see *supra* notes 107-43 and accompanying text. For a discussion of the varying interpretations of the term “discharge” in CWA section 401, see *supra* notes 43-47 & 99-143 and accompanying text.

154. Cf. *id.* (referencing *National Wildlife* in support of position term “discharge” in CWA includes only point sources, and, failing to distinguish between operation of word “includes” versus “means” within statutory definition). For the *ONDA II* court’s rationale in equating the terms “discharge” and “discharge of a pollutant,” see *supra* notes 107-15 and accompanying text.

155. Compare *ONDA II*, 1998 WL 407711, at \*1 (excluding all nonpoint source pollution from certification requirement of section 401) with *Oregon Natural Desert Ass’n v. Thomas*, 940 F. Supp. 1534, 1541 (D. Or. 1996) (“This court holds that [section] 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources.”), *rev’d sub nom.* *Oregon Natural Desert Ass’n v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998).

156. See *ONDA II*, 1998 WL 407711, at \*5-7 (failing to accurately distinguish between discharge and “discharge of a pollutant”). For an overview of activities and water pollution potentially exempt from CWA regulation as a result of this failure, see *supra* notes 6 & 8 & 11 & 17; *supra* note 70 and accompanying text.

157. See *id.*; see also *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 844 (9th Cir. 1987) (stating issue before court was whether water quality standards may be enforced absent NPDES permit under section 301(b)(1)(c) of CWA). In addition, contrary to the *ONDA II* court’s observation, the *ONRC* decision is distinguishable because the plaintiffs in *ONRC* did not sue under CWA’s citizen suit provision. See *ONRC*, 834 F.2d at 851 (agreeing with plaintiff’s argument claim was brought pursuant to Administrative Procedure Act). The *ONRC* court determined that the plaintiffs sought a determination that the timber harvesting activities violated state water quality standards under CWA section 303. See *id.* (concluding plaintiff’s claim did not seek damages under citizen suit provision). The *ONRC* court expressly stated that the “plaintiffs [were] not attempting to enforce the Act pursuant to the citizen suit provision.” *Id.* For dis-

preting section 301 as prohibiting only point sources of pollution, was called into doubt by the Supreme Court's decision in *PUD*.<sup>158</sup> Further, the *ONRC* court's analysis focuses on the term "discharge of a pollutant."<sup>159</sup> In contrast, the issue in *ONDA II* focuses on CWA section 401, which prohibits "any discharge."<sup>160</sup> Under section 401, an activity which may result in "any discharge" from a federal activity must comply with numerous provisions, including section 301.<sup>161</sup> The Ninth Circuit, thus, inappropriately supported its interpretation of discharge by analogizing the term "discharge" to the interpretation of one CWA section, using the narrower term "discharge of a any pollutant," that the broader phrase "any discharge" in CWA section 401 must comply with.<sup>162</sup>

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cussion of the *ONDA II* court's incorrect reading of their decision in *ONRC*, see *supra* note 123.

158. Compare *PUD* No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 711-12 (1994) (holding CWA section 301 encompasses water quality standards regardless if related to discharge) with *ONRC*, 834 F.2d at 850-51 (holding section 301 of CWA applies exclusively to point sources of pollution, stating citizen suit provision cannot be used to enforce nonpoint source water quality standards). For the proposition that the Ninth Circuit's holding and analysis in *ONRC* of section 301 were overruled by the Supreme Court's decision in *PUD*, see *supra* note 42. For the Ninth Circuit's recognition that the *PUD* decision called into question their holding in *ONRC*, see *infra* note 189 and accompanying text. For a further discussion of the facts, reasoning and holding in the Ninth Circuit's *ONRC* decision, see *supra* note 38. For a discussion of the Ninth Circuit's interpretation, and subsequent application, in *ONDA II* of its decision in *ONRC*, see *supra* notes 122-28 and accompanying text.

159. See *ONRC*, 834 F.2d at 849-50 (analyzing term "discharge of a pollutant" under section 301). The *ONRC* court supported its position referencing section 301's title, "Effluent limitations" in concluding effluent limitations are limited to point sources of pollution. See *id.* at 849. CWA section 301(a), defining the scope of section 301, qualifies the "discharge of any pollutant." See C.W.A. § 301(a), 33 U.S.C. § 1311(a). For the relevant statutory language of section 301(a), addressing "discharge of pollutants," see *supra* note 26. Further, CWA section 401(a) addresses "any activity . . . which may result in any discharge." C.W.A. § 401(a), 33 U.S.C. § 1341(a). The narrower term "discharge of a pollutant" does not appear in this section. See C.W.A. § 401(a), 33 U.S.C. § 1341(a).

160. For the relevant statutory language of CWA section 401(a), defining the scope of section 401, see *supra* notes 28 & 38. For *ONDA*'s arguments that the *ONRC* decision was not relevant because of this distinction, see *supra* note 123. Section 401's title, in contrast to section 301's title, is entitled "Certification." See *id.* C.W.A. §§ 301 & 401, 33 U.S.C. §§ 1311 & 1341.

161. See *id.* C.W.A. § 401, 33 U.S.C. § 1341. For the list of CWA provisions which must be complied with, see *supra* note 38.

162. For a discussion of the distinction between the terms "discharge of a pollutant" and CWA section 401's "discharge," recognizing the narrower scope of the former, see *supra* note 45; Donahue, *supra* note 8, at 229-32 (discussing section 401's broad language, "any discharge"). For an explanation of how the court in *ONDA II* inappropriately equated the two "discharge" terms, see *supra* note 151-54 and accompanying text. For an elaboration on an appropriately broad reading of the term "any discharge," see *supra* note 45.

Further, *ONCR* never directly addressed whether the activity in question was a point source or a nonpoint source of pollution, merely relying on another Ninth Circuit case, *Trustees for Alaska v. EPA* (*Trustees for Alaska*),<sup>163</sup> in assuming the activity in question was a nonpoint source of pollution.<sup>164</sup> The *Trustees for Alaska* decision, however, contradicts, rather than supports, the Ninth Circuit's decision in *ONDA II* in two critical ways. First, in *Trustees for Alaska*, the Ninth Circuit specifically adopted the Tenth Circuit's reasoning in *United States v. Earth Sciences Inc.*, (*Earth Sciences*)<sup>165</sup> which found unsupportable the proposition that in distinguishing between nonpoint and point sources of pollution, runoff could never emanate from a point source simply because the term "runoff" was referenced in provisions relating to the control of nonpoint sources of pollution.<sup>166</sup> Second, the *Trustees for Alaska* court recognized that

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163. 749 F.2d 549 (9th Cir. 1984).

164. See *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 848-49, 849 n.9 (9th Cir. 1987) (stating plaintiffs conceded point source discharges not at issue because section 301(a) refers to point source discharges, and providing definition of nonpoint source from *Trustees for Alaska*). Similarly, the *PUD* court and the *National Wildlife* court did not address whether the discharges at issue emanated from point or nonpoint sources. See *supra* notes 42 (discussing *PUD*) & 50 (discussing *National Wildlife*). For the characterization of nonpoint sources by *Trustees for Alaska*, and a list of Ninth Circuit cases addressing nonpoint sources and nonpoint source pollution, see *supra* notes 68-73.

165. 599 F.2d 368 (10th Cir. 1978).

166. See *Trustees for Alaska v. EPA*, 749 F.2d 549, 557-58 (9th Cir. 1984) (noting Tenth Circuit found Congress's rejection of a CWA Amendment, which proposed to regulate mining point sources separately because of overlapping general regulatory provisions, supported conclusion gold mining operations discharging runoff was point source). In adopting the Tenth Circuit's reasoning, the Ninth Circuit in *Trustees for Alaska* implicitly agreed with the conclusion that activities causing runoff may cause either point or nonpoint source discharges. Cf. *id.* (holding mining activity was point source although also regulated in section 304(f)(2)(B) discussing nonpoint sources). For the Ninth Circuit's reasoning in reaching this conclusion in *Trustees for Alaska*, see *supra* note 71. The *ONDA II* court, however, explicitly precluded any overlapping or duplicative regulation, maintaining a strict division between regulation of point and nonpoint sources. For the *ONDA II* court's narrow reading of CWA's dual regulatory scheme, see *supra* notes 116-28 and accompanying text. Further, the *ONDA II* court, in specifically concluding all runoff emanates from a nonpoint source, failed to consider prior decisions which hold that runoff may emanate from a point source where the source is a "discernible, discrete and confined conveyance." See, e.g., *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1424 n.8 (9th Cir. 1989) (defining nonpoint source). For judicial decisions, including Ninth Circuit decisions, recognizing runoff from a "discrete, confined conveyance" may emanate from a point source, see *supra* notes 69-71 and accompanying text. For *ONDA II*'s review of CWA's use of the words "discharge" and "runoff" within CWA's provisions, supporting the proposition the term "discharge" only encompasses point sources, see *supra* notes 129-32 and accompanying text.

point sources of pollution must be interpreted broadly in order to effectuate the remedial goals of CWA.<sup>167</sup>

## 2. Is There a "Point" in Grazing Cows?

The Ninth Circuit may have impermissibly broadened the scope of its holding by inadequately addressing the Supreme Court's ruling in *PUD*.<sup>168</sup> Further, in narrowly construing the term "point source," the *ONDA II* court incorrectly applied precedent in evaluating whether grazing on federal land constitutes a point source.<sup>169</sup> Most importantly, the Ninth Circuit undermined CWA's goal to regulate all identifiable sources of pollution by excluding nonpoint sources of pollution with a conveyance from section 401.<sup>170</sup>

167. Cf. *id.* at 559 (adopting Tenth Circuit's reasoning in *Earth Sciences*, which provides point sources should be interpreted expansively); see also *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (asserting regulating all source of pollution requires broad reading of term "point source"). For a discussion of the *Trustees for Alaska* court's application of the principle that the term "point source" should be broadly construed, see *supra* note 71.

168. See *ONDA II*, 1998 WL 407711, at \*6 (interpreting *PUD* as concluding all nonpoint sources of pollution are excluded from regulation under section 401); see also Donahue, *supra* note 8, at 219 (suggesting *PUD* implied that a wide variety of federal permits fall within section 401's authority regardless of pollution source). The *ONDA II* court concluded that the parties in *PUD* conceded the dam and tailrace pipe would result in a discharge, thus were point sources, and by inference nonpoint sources were excluded. See *ONDA II*, 1998 WL 407711, at \*6. The parties in *PUD*, however, only conceded that the emissions could be possible discharges. See *supra* note 36. As a result, the issue of whether the dam and tailrace were point sources was not an issue before the Court. See *supra* notes 40-42 and accompanying text. In contrast, the *ONDA II* court concluded that the two releases were from point sources, failing to recognize that this was never addressed and asserted in *PUD*. See *ONDA II*, 1998 WL 407711, at \*6. In fact, one of the sources may not have been a point source. See *supra* notes 40-42. Indeed, the language in the *ONDA II* court's decision reflects uncertainty as to the inevitability these releases in *PUD* would emanate from point sources; the court stated, "The dredge and fill operation *presumably* would involve a conveyance or rolling stock." *ONDA II*, 1998 WL 407711, at \*6 (emphasis added). For a further discussion of *PUD*, reflecting a broader application of section 401, see *supra* note 42.

169. See *ONDA II*, 1998 WL 407711, at \*7 (rejecting argument grazing cattle are point source). For a discussion of *ONDA II*'s implicit adoption of precedent advocating a broad interpretation of the term "point source," see *supra* note 67. For the *ONDA II* court's analysis and conclusion regarding what constitutes a point source of pollution, see *supra* notes 129-38. For a discussion of the Ninth Circuit's broader characterization of nonpoint sources and nonpoint source pollution, see *supra* notes 69-71.

170. See *id.* (excluding from section 401's phrase "any discharge" pollution sources not specifically listed in point source definition). For Ninth Circuit decisions recognizing that identifiable sources may be point sources, regardless of pollution type, see *supra* notes 69-73 and accompanying text. For a discussion of the appropriateness in focusing on an identifiable source of pollution in distinguishing between point and nonpoint sources, and defining a point source, see *supra* notes 64-85 and accompanying text.

a. "Yes," because cows aren't "runoff"

The Ninth Circuit asserts that effluents are discharges because they emanate from a point source, while runoff is not a discharge, emanating from nonpoint sources of pollution.<sup>171</sup> The fifty grazing cattle in *ONDA II*, however, do not meet the Ninth Circuit's characterization of nonpoint sources excluded from section 401.<sup>172</sup> First, the cattle's grazing activity in *ONDA II* directly deposited pollution into the stream.<sup>173</sup> Second, the cattle are an identifiable and con-

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171. See *id.* at \*6-7 (discussing use of term "runoff" in CWA). Runoff, however, can in some cases be recognized as emanating from a point source. See, e.g., *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (holding liquid manure emanates from point source), *cert. denied*, 514 U.S. 1082 (1995). It is interesting to note that the D.C. Circuit in *National Wildlife*, which the *ONDA II* court relied on as support for its reading of the scope of the term "discharge" in section 401, specifically *rejected* the proposition that runoff cannot emanate from a point source. See *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 n.8 (D.C. Cir. 1982). In rejecting EPA's assertion that an addition must be "from" a point source, the *National Wildlife* court observed that a "discharge of a pollutant" includes runoff which is collected or channeled by man. See *id.* at 175 n.58. In addition, the *ONDA II* court relied on their decision in *Trustees for Alaska*, as quoted in *ONRC*, which not only recognizes a broad interpretation of point source, but also emphasizes the ability of identifying polluters as the means to differentiate between point and nonpoint source pollution. See *supra*, notes 69-71; see also Wood, *supra* note 17, at 577 (giving *Trustees for Alaska* as example of court decision categorizing sources based on identifiability of polluter). For judicial decisions determining runoff to be from a point source, see *supra* notes 68-73 and accompanying text. For a discussion of the facts, holding, and court rationale in *Southview Farm*, see *supra* notes 74-76 and accompanying text.

172. For the Ninth Circuit's characterization of nonpoint sources, and nonpoint source pollution, see *supra* notes 68-73. For judicial decisions holding that runoff which is channeled and collected by man emanates from a point source, see *supra* notes 68-71. See also Gould, *supra* note 8, at 472 (defining nonpoint source). The Ninth Circuit in *ONDA II* characterized nonpoint pollution as runoff caused primarily by rainfall, from an unidentifiable source. See *ONDA II*, 1998 WL 407711, at \*6-7 (quoting *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987); *Trustees for Alaska*, 749 F.2d at 558). In *ONDA II*, it is conceded that the cattle cause a significant amount of pollution. See *id.* at \*1. Further, the Ninth Circuit noted that examples of runoff exempted from NPDES certification requirements include irrigated agriculture and silvicultural activities. See *id.* at \*6-7 (citation omitted). This, however, does not equate with livestock grazing. Nonpoint source pollution is diffuse, not "result[ing] from a discharge at a specific, single location. . . but generally results from land runoff, precipitation, atmospheric deposition, or percolation." Gould, *supra* note 8, at 472 (quoting Office of Water, U.S. Environmental Protection Agency, *NONPOINT SOURCE GUIDANCE* 3 (1987)); see also Saperstein, *supra* note 10, at 889-890 (defining nonpoint source pollution). The cattle in *ONDA II* congregate daily in the same area, and could easily be fenced in to preclude them from wading in the waters. See *ONDA II*, 1998 WL 407711, at \*7.

173. See *ONDA II*, 1998 WL 407711, at \*1. Because the Ninth Circuit relied on its decisions in *ONRC* and *Trustees for Alaska*, reference to *Earth Sciences* is appropriate in distinguishing between point and nonpoint sources of pollution. See *supra* note 69; *supra* notes 163-67 and accompanying text. The *Earth Sciences* court specif-

trollable source.<sup>174</sup> Last, unlike irrigated agriculture, and the silvicultural activities at issue in *ONRC*, grazing is not expressly exempt from NPDES permitting requirements.<sup>175</sup> The *ONDA II* court thus

ically stated that in order to further Congress's goal to eliminate *all* pollution from the nation's waters,

[t]he concept of a point source was designed . . . [to] embrac[e] the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States. It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived . . . . We believe it contravenes the intent of [CWA] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point.

*Earth Sciences*, 599 F.2d at 373. EPA defines point sources as pollutants that "are discharged directly from the conveyance into a waterbody. You can stand by the river bank and point to the discharge and tell others where the flow is coming from." Environmental Protection Agency, *Nonpoint Source Program Information for Kids* (visited Jan. 19, 1999) <<http://www.epa.gov/reg3wpd/3wp13/nonpoint/kids.htm>>. Grazing cattle despositing dung and sediment from the banks into waterbodies reflects this notion of a point source.

174. See, e.g., Frank, *supra* note 6, at 1300-02 (demonstrating means by which cattle may be become controllable and identifiable and thus point sources). For discussion of cattle grazing, and other nonpoint sources of pollution, falling within the definition of point source, see *supra* notes 11 & 17; *supra* notes 69-73 and accompanying text.

175. See generally C.W.A. § 304(f)(2), 33 U.S.C. § 1314(f)(2) (listing nonpoint sources subject to mandatory publication requirement of information regarding pollution control methods); C.W.A. § 402, 33 U.S.C. § 1342 (listing activities exempt from NPDES permit program). The *ONDA II* court quoted *ONRC* and *Trustees for Alaska* in support of its assertion that runoff cannot be a point source of pollution. See *supra* note 131. Neither the *ONRC* court, nor the *Trustees for Alaska* court, however, precluded *all* runoff from being point source pollution, but rather referenced section 304(f)(2)'s list of nonpoint source pollution specifically to determine those activities *expressly* exempt from NPDES permit requirements. See *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987) (addressing argument nonpoint sources of pollution affecting water quality standards subject to citizen suit provision); *Trustees for Alaska*, 834 F.2d at 557-58 (establishing types of mining activity exempt from NPDES permit requirements). Each court only referenced the 304(f)(2) subsection pertinent to the activity at issue in the case before them, and thus, did not address whether all activities which result in runoff are point or nonpoint sources of pollution. Cf. *ONRC*, 834 F.2d at 849 n.9 (eluding only to CWA subsection (f)(2)(A)), citing as support *Trustees for Alaska*; *Trustees for Alaska*, 749 F.2d at 558 (addressing subsection pertaining to mining activities (quoting C.W.A. § 304(f)(2)(B), 33 U.S.C. § 1314(f)(2)(B))).

For a discussion of the *ONRC* court's reasoning in citing *Trustees for Alaska*, see *supra* note 38. For Ninth Circuit decisions recognizing the exemption of these sources of pollution, see *supra* notes 38 & 69. For cases within the Ninth Circuit relying on a section 402 exemption in concluding activities related to logging and road construction do not fall within the definition of point source, see generally *ONRC*, 834 F.2d 842 (9th Cir. 1987); *O'Aha'imo v. Galiher*, 28 F. Supp.2d 1258 (D. Haw. 1998); *Idaho Conservation League v. Caswell*, No. CV 95-394-S-MHW, 1996 WL 938215, at \*1 (D. Idaho Aug. 12, 1996). For a list of discharges not regulated under the NPDES permit program, see *supra* note 26.



improperly analogized cattle grazing to agricultural and silvicultural activities.<sup>176</sup>

In addition, the Ninth Circuit again relied on a distinguishable case in concluding that animals cannot be point sources of pollution.<sup>177</sup> Contrary to the *ONDA II* court's assertion, the Second Circuit's holding in *Plaza Health* did not preclude *all* animals from the definition of point source.<sup>178</sup> In *Plaza Health*, the Second Circuit determined that a *human being* could not be a point source.<sup>179</sup> First, the Second Circuit recognized that the definition of point source has been appropriately broadly interpreted in civil and licensing cases.<sup>180</sup> Second, the *Plaza Health* court found the term "point source" to be ambiguous as to whether a human being could be a point source because the definition does not either include, or exclude, a human being.<sup>181</sup> The Second Circuit *specifically* based its holding on the rule of lenity for a criminal conviction of a *human being*.<sup>182</sup> The action before the *ONDA II* court, however, was

176. Cf. *ONDA II*, 1998 WL 407711, at \*6 (referencing exempted activities in concluding livestock grazing is nonpoint source of pollution not meeting definition of point source).

177. See *id.* at \*7 (citing *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993), cert. denied by *United States v. Villegas*, 512 U.S. 1254 (1994)). For the facts, holding and court rationale in *Plaza Health*, see *supra* notes 81-85 and accompanying text.

178. For the *Plaza Health* court's narrow holding, excluding human beings from the definition of point source based on the rule of lenity, See *supra* note 85.

179. See *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649-50 (2d Cir. 1993), cert. denied by *United States v. Villegas*, 512 U.S. 1254 (1994). For a complete analysis of the *Plaza Health* court's reasoning and holding, see *supra* notes 70-72; *supra* notes 81-85 and accompanying text. For a critical discussion of the *Plaza Health* decision, asserting human beings are point sources, see *supra* note 85.

180. See *id.* at 648-49 (declining to apply broad interpretation principle in criminal case).

181. See *id.* at 646 (analyzing point source definition).

182. See *id.* at 648-49. The court in *Plaza Health* specifically noted that the rule of lenity, and not the definition of point source, precluded finding a human being a point source. See *id.* at 649-50. Similar to persons, cattle are not specifically exempted or included as point sources. See generally C.W.A. § 502, 33 U.S.C. § 1362. Thus, it can be argued that the Ninth Circuit erroneously assumed that grazing was an exempted activity like irrigated agriculture and silvicultural activities. Cf. *ONDA II*, 1998 WL 407711, at \*7 (analogizing grazing activities to examples of specific exempted activities under CWA). In addition, recognizing a broad interpretation of point source in civil cases may well include activities such as cattle grazing. Some commentators assert that livestock grazing is more appropriately a nonpoint source of pollution. See, e.g., Frank, *supra* note 6, at 1300-02 ("[T]he Clean Water Act specifically recognizes the need for protection of waters associated with 'land used for livestock' in its nonpoint regulatory program.") (citing C.W.A. § 208(b)(2)(F), 33 U.S.C. § 1288(b)(2)(F)(1990)). Livestock grazing, however, may be considered point source pollution in particular situations, such as when cattle wade in waters. See *id.* (giving example of appropriate point source regulation of livestock grazing as "when cattle physically enter a body of water"). The

brought pursuant to a civil citizen suit and would not result in a criminal conviction against the *fifty grazing cattle*.<sup>183</sup> In analogizing to *Plaza Health*, therefore, the *ONDA II* court failed to consider the limitation of the holding.

*b. "No" point may be okay*

The Ninth Circuit distinguished the Supreme Court's decision in *PUD* based on the presence of a point source.<sup>184</sup> The *ONDA II* court used this basis to support its conclusion that section 401 does not encompass nonpoint sources.<sup>185</sup> The Court in *PUD*, however, did not address whether the sources of pollution in question were in fact point sources.<sup>186</sup> Instead, the Court focused more broadly on the allowable scope of state authority in the presence of a discharge.<sup>187</sup> In contrast, the Ninth Circuit, in presuming that one of the sources, the tailrace, was a "conveyance" under the Act, incorrectly inferred a limitation in section 401 to point sources.<sup>188</sup> In addition, the Ninth Circuit neglected to address its own precedent interpreting the impact of the 1972 Amendments to CWA. In relying on *ONRC* to interpret the meaning of the 1972 Amendments,

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dissent in *Plaza Health* pointed out that the focus on distinguishing between point and nonpoint sources of pollution is based on what is identifiable and controllable. See *Plaza Health*, 3 F.3d at 653-54. It can be inferred that the Second Circuit may have included nonpoint sources that are identifiable, such as the cattle grazing in *ONDA II*, in its definition of point source if they had not been addressing an issue which would result in a criminal conviction. For the statutory definition of point source, see *supra* note 54 and accompanying text. For a discussion of the facts, holding and rationale in *Plaza Health*, see *supra* notes 81-85 and accompanying text.

183. See *Oregon Natural Desert Association v. Dombeck*, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*1 (9th Cir. July 22, 1998) (explaining lower court's holding which required USFS to obtain state certification), *rev'g* *Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996).

184. See *id.* at \*6. For the Ninth Circuit's analysis and conclusion that the Court's decision in *PUD* supported their holding that discharges only include point sources of pollution, see *supra* note 128.

185. See *supra* note 128.

186. See *supra* notes 41-42 and accompanying text; see *Donahue*, *supra* note 8, at 217 (construing *PUD* as supporting proposition that discharge type is irrelevant for section 401).

187. For the text of the issue before the *PUD* court, see *supra* note 35; see also *Donahue*, *supra* note 8, at 217 (noting *PUD* court did not address type of source two discharges emanated from).

188. See *ONDA II*, 1998 WL 407711, at \*6 ("Both of these releases, however, would involve point sources; the tailrace is a conveyance . . ."); see also *Donahue*, *supra* note 8, at 238-39 n.205 (noting tailrace can be point source but only when water contains pollutants) (citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 n.22 (D.C. Cir. 1982)).

For a critical discussion of the implications of the *PUD* decision for coverage of nonpoint sources under section 401, see *supra* notes 41-42.

the Ninth Circuit failed to consider its decision in *Northwest Environmental Advocates v. City of Portland* (*Northwest Environmental Advocates*).<sup>189</sup> The *ONRC* court found the establishment of a “concomitantly created” dual regulatory system by Congress to address water pollution dispositive of congressional intent to exclude nonpoint source pollution from NPDES regulation.<sup>190</sup> In contrast, the Ninth Circuit expressly stated in *Northwest Environmental Advocates*, that the Amendments were intended to *improve* enforcement of compliance with water quality standards, not *supplant* the old system.<sup>191</sup> Looking at the plain language of the Act, in conjunction with legislative history as interpreted by the Ninth Circuit, the Ninth Circuit should have recognized that the term “discharge” within section 401 is an expansive term, or alternately, can reasonably be interpreted several ways.<sup>192</sup> Further, given the conflicting

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189. 56 F.3d 979 (9th Cir. 1995), *reh'g denied*, 74 F.3d 945 (9th Cir. 1995), and *cert. denied*, 518 U.S. 1018 (1996). The *ONRC* court stipulated that state water quality standards cannot be enforced if affected by nonpoint sources of pollution. See *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849-50 (9th Cir. 1987). Reviewing the relevant case law pertinent to the issue before them, the *Northwest Environmental Advocates* court, however, observed that the Supreme Court's decision in *PUD* “cast[s] into considerable doubt our holding . . . that citizens do not have standing under the Clean Water Act to enforce water quality standards unless they have been translated into end-of-the-pipe effluent limitations.” See *id.* at 981. The *Northwest Environmental Advocates* court construed the Court's decision in *PUD* as supporting their view that “Congress intended to confer citizens standing to enforce water quality standards.” *Id.* at 987. The Ninth Circuit reasoned that, even though *PUD* addressed CWA section 401 as opposed to CWA section 402, both provisions require compliance with CWA section 301, which incorporates CWA section 303's water quality compliance requirements. See *id.* at 988 (disagreeing *PUD* decision was not relevant to issue before *Northwest Environmental Advocates* court).

For a discussion of the facts, holding and the Ninth Circuit's interpretation of CWA's 1972 Amendments supporting its holding in *Northwest Environmental Advocates*, see *supra* note 34. For the proposition that the *ONRC* decision was also called into question by the Supreme Court's ruling in *PUD*, see *supra* note 42. For the proposition that the Supreme Court's *PUD* decision supports the argument that nonpoint sources of pollution fall within the ambit of the term “discharge” in section 401, see *supra* note 42.

190. See *ONRC*, 834 F.2d at 849-50. For an in-depth discussion of the Ninth Circuit's *ONRC* decision, see *supra* note 38. For a discussion of how the *ONDA II* court misinterpreted, and misapplied, the court's analysis and holding in *ONRC*, see *supra* notes 156-67 and accompanying text. For an overview of CWA's dual regulatory system, see *supra* notes 10-11 & 33-34 and accompanying text; *supra* note 38 (discussing *ONRC*); *supra* note 81 (discussing *Shanty Town Associates Ltd. Partnership v. EPA*); *supra* notes 116-28 and accompanying text (presenting analysis of *ONDA II*).

191. See *Northwest Envtl. Advocates*, 56 F.3d at 986. For a discussion of the Ninth Circuit's interpretation of the 1972 Amendments' impact, see *supra* note 34.

192. For the varying interpretations of the term “discharge,” see *supra* notes 43-45 and accompanying text; see also Miles, *supra* note 4, at 225 (recognizing validity of arguments for and against broad reading of discharge); Hersperger, *supra* note 70, at 112 (“Focusing on the broad statutory language and objectives of the

views within the Ninth Circuit regarding the impact of CWA's 1972 Amendments, the *ONDA II* court should have looked to the overriding purpose of CWA in addressing the issue before them.<sup>193</sup>

## V. IMPACT

The *ONDA II* decision has immediate practical implications, as well as policy implications. The Ninth Circuit's broad decision goes beyond excusing USFS for failing to require a state certification for the fifty grazing cattle<sup>194</sup> and possibly stifling the broad impact of *ONDA I*.<sup>195</sup> First, the Ninth Circuit specifically excluded all animals, including the grazing cattle, from the definition of point source; thus, the judicial courts of states located within the Ninth Circuit are precluded from broadly interpreting a point source to include animals.<sup>196</sup> Second, the decision exempts all activities on federal lands from state regulation under section 401 in the absence of point source pollution.<sup>197</sup> Determining whether an activity requires state certification should, in theory, depend upon how broadly or

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Clean Water Act would result in a more sensible interpretation of the Celan Water Act.").

193. For a discussion of the conflicting views regarding the impact of the 1972 Amendments to CWA, see *supra* notes 34 & 45. For a general discussion of the impact of nonpoint source pollution, and possible policy considerations the Ninth Circuit failed to consider in their *ONDA II* decision, see *supra* notes 8-17 and accompanying text. For the purposes and goals of CWA the Ninth Circuit failed to adequately address in their *ONDA II* decision, see *supra* notes 1-3 & 24-25 and accompanying text.

194. *Cf. Egelko, supra* note 10, at A-14 (explaining lawyer for intervenor-defendant, Grant County, was relieved because "the county depends on revenue from cattle grazing and could have also been required to seek state permits for some of its operations, if [*ONDA I*] had been interpreted broadly"). The *ONDA II* decision's direct impact includes relieving ranchers in Oregon of the requirement to obtain state certification before grazing cattle on federal lands. See Alkire, *supra* note 10, at 738. The process required for obtaining state certification is reported to be both time consuming and complicated. *Id.*

195. For a discussion of the effects of nonpoint source pollution, which could have been abated or eliminated under section 401's enforcement provision after *ONDA I*, see *supra* notes 18-17 and accompanying text; see also Egelko, *supra* note 10, at A-14 (following *ONDA I*, Oregon required ranchers to limit pollution by managing grazing through installation of fences and monitoring stream vegetation). For the *ONDA I* court's holding and rationale, see *supra* notes 99-106 and accompanying text. For a critical discussion of the *ONDA II* court's decision, see *supra* notes 144-93 and accompanying text.

196. For the text of this determination by the *ONDA II* court, see *supra* note 135; see also Bernard Mower, *Nonpoint Sources: Grazing of Cattle on Federal Lands Exempt From CWA*, *Ninth Circuit Says*, 29 Env't Rep. (BNA) 697 (July 31, 1998) (reporting on Judge M. Schroeder's decision in *ONDA II* holding point source definition does not include animals).

197. See *supra* notes 139-43 and accompanying text; see also *ONDA II*, 1998 WL 407711, at \*7 (expanding holding beyond facts of case).

narrowly the term "point source" is defined.<sup>198</sup> Given the Ninth Circuit's narrow construction of the term "point source," however, courts within its purview may be unwilling to expansively interpret the term "point source."<sup>199</sup> Further, states are now precluded from considering the impact of an enormous array of activity without nonpoint sources being subject to 401 review.<sup>200</sup>

*ONDA II* is the first case in which a circuit court has held that the term "discharge" does not encompass nonpoint sources of pollution in any form.<sup>201</sup> Yet, nonpoint source pollution is responsible for a majority of the water pollution on federal lands.<sup>202</sup> Given the amount of federal land located within the Ninth Circuit, the potential amount of nonpoint source pollution exempt from state review and state water quality standards is enormous.<sup>203</sup> Exempting nonpoint source pollution from direct regulation may withdraw incentive for states to work toward implementation of new technolo-

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198. For an overview of the means courts use to distinguish between point and nonpoint sources, including broadly interpreting the term "point source," see *supra* notes 64-85 and accompanying text. Indeed, one noted environmental expert pointed out that in the fight against nonpoint pollution, EPA has the power to expand the list of point sources. See RODGERS, *supra* note 10, at 308. In the alternative, he noted that since mandatory state plans and review are much more effective than promulgation of voluntary state guidelines, "the drawing of the law more tightly around nonpoint sources may transform them into 'point' sources for enforcement purposes." *Id.*

199. See Egelko, *supra* note 10, at A-14. In addition, other environmental groups expressed concern that Oregon, and other western states, will not establish pollution control plans addressing the effects of grazing, logging and mining given the court's narrow reading of point source. See *id.* (noting only point sources require permit). For a discussion of CWA's failure to adequately regulate nonpoint sources, and the effect of leaving unregulated the majority of water pollution sources, see *supra* notes 8 & 10-11 & 17.

200. For the definition of nonpoint source pollution, and nonpoint sources, see *supra* notes 6 & 8 & 10 & 11 & 17; *supra* notes 54-85 and accompanying text; see also Mower, *supra* note 196, at 697 (quoting Michael Axline, Attorney for appellees, who "warned that the court's conclusion also may impair state capacity to control pollution from timber cutting on federal lands"); cf. also Egelko, *supra* note 10, at A-14 (reporting environmental groups "hoped the [*ONDA I*] ruling would lead to reductions in grazing on vast federal land holdings in the west and its effect on water quality . . . and could have been extended to such activities as logging and mining on federal lands"); accord Alkire, *supra* note 10, at 738 (mandating 401 review for nonpoint sources could have led to required 401 certification on federal lands for "logging, mining, resort development, road building, and maintaining utility rights of way for electricity transmission and pipelines").

201. Cf. Mower, *supra* note 196, at 697 (noting Ninth Circuit was first federal appeals court to address question of animals as source of pollution (quoting Attorney Michael Axline of Western Environmental Law Center, attorney for appellees)).

202. See *supra* note 8 and accompanying text.

203. See generally *supra* notes 1-17; see also Ransel, *supra* note 42, at 270 n.107 (noting existence of 27,000 permits for grazing on federal land which could affect 3.2 million acres of riparian area); Mower, *supra* note 196, at 697.

gies aimed at reducing nonpoint source pollution.<sup>204</sup> Thus, without the threat of litigation under CWA, the burden will be on point source polluters to maintain water quality standards.<sup>205</sup> The *ONDA II* decision is based on policy benefitting discrete, polluter interest groups at the expense of national resources, and contravenes the goals of CWA.<sup>206</sup> CWA should be amended to include nonpoint source pollution within the ambit of section 401, which will fulfill Congress's intent for states to protect waters within their boundaries, and further CWA's goals.<sup>207</sup>

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204. For a critical discussion of current nonpoint source regulation under CWA, see *supra* notes 8 & 10 & 11 & 17; see also Alkire, *supra* note 10, at 738. This is a particular risk in states that do not have laws requiring compliance with state water quality standards for nonpoint sources of pollution. See *id.* For example, Oregon does not currently have a water pollution control plan regulating nonpoint source pollution. See Egelko, *supra* note 10, at A-14. For a discussion of the problems arising from lax land regulation, see *supra* notes 8 & 10 and accompanying text. For a discussion of proposed solutions aimed at effectively reducing nonpoint source pollution, see *supra* notes 10 & 17 and accompanying text.

205. See *supra* note 10; see also Adler, *supra* note 10, at 229 (warning failing to place controls on nonpoint sources would be inequitable "as point sources would be required to bear more than their share of pollution control obligations"); Alkire, *supra* note 10, at 738 (placing the burden on point source polluters may "lead to increased restrictions on point source expansion and discharge permits"). In addition, one commentator warned that the consequences of federal agencies failing to limit nonpoint pollution may include "expensive and time-consuming litigation." Styron, *supra* note 4, at 114. In addition, Congress may act to mandate stricter federal controls of nonpoint sources of pollution. See *id.* Unfortunately, Congress has yet to make this step toward stricter regulation of nonpoint sources a reality.

206. For a discussion of possible reasons for Congress's, and the states', failure to impose stricter controls on nonpoint sources of pollution, see *supra* notes 10 & 17; see also Egelko, *supra* note 10, at A-14 ("Oregon Cattlemen's Association says the cost of state permits – which it estimates at \$200 a day for monitoring, and \$4,800 in consulting fees – would make grazing on public lands too expensive.").

207. For a discussion of CWA section 401 as an effective means of furthering these objectives, see *supra* note 17; cf. Donahue, *supra* note 8, at 236 (asserting precluding state review would hinder nonpoint source regulation); Miles, *supra* note 4, at 227 ("By giving states the opportunity to certify federally permitted nonpoint source activities for compliance with state water quality standards, section 401 can work in harmony with the other provisions of the Act requiring states to regulate nonpoint source pollution."). Water quality maintenance is the primary responsibility of the states, thus it was posited by one commentator that "[c]onstraining the states from considering [nonpoint source] impacts when conducting 401 reviews would drastically undermine their ability to carry out their responsibility to control [nonpoint source] pollution and, indeed, to implement their water quality standards." Donahue, *supra* note 8, at 236. Current regulation of CWA has been largely ineffective. See *supra* notes 8 & 10 & 11. Section 401 offers a viable solution for reducing the most pernicious pollution affecting the quality of our nation's waters. See *supra* note 17.

